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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, Petitioner,

Versus

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

CHARLES E. DUNBAR, JR.,
MONTE M. LEMANN,
J. BLANC MONROE,
WALKER B. SPENCER,
Attorneys for Respondent.

BRADY & PFAFF LTD., NEW ORLEANS

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No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, Petitioner,

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WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the District Court is reported in 38 F. (2nd) 642. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 38 F. (2nd) 649.

JURISDICTION

The case comes to this Court upon the petition for certiorari filed by the United States granted May 26, 1930, (R. 35). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The brief for the United States, petitioner, contains an accurate statement of the facts, which were stipulated below. (R. 9-15).

Special attention may be called to the fact that the returns made by the husband and the wife in the present case, dividing the community income between them, were made in accordance with the rulings of the Treasury Department then on file and in effect (R. 11). These rulings had been in force for a number of years and were based upon an opinion rendered by the Attorney-General in 1921.

QUESTION INVOLVED

The question involved is whether the income accruing in Louisiana to a husband and wife domiciled in that State and forming their community income under its laws may be entirely taxed to the husband or whether he may be taxed only for half thereof, leaving the other half to be taxed to the wife.

SUMMARY OF ARGUMENT

The Federal Revenue Acts tax each individual only on the income belonging to him or her. The language of the Revenue Act of 1926, as well as the similar language contained in previous Revenue Acts, clearly authorizes husband and wife to each report his or her income in a separate return.

What is property or income in any particular case for the purpose of applying the Federal Revenue Law is determined by the law of the state in which the owners are domiciled and the income accrues. Under the law of Louisiana, the wife has an equal one-half ownership in community partnership income.

There is nothing in the language of the Revenue Act of 1926, or prior acts, (except the provision taxing the donor of a revocable trust hereinafter referred to) expressly or impliedly indicating an attempt on the part of Congress to tax an individual, or husband, on income admittedly belonging to another person on the theory of the dominion and control over such income exercised by the individual, or husband, sought to be taxed. By the lan-

guage of the Revenue Act, it is the net income "of" an individual which is taxed, and not the net income "controlled by" an individual. Since 1920, the Treasury Department and the Attorney General, in carefully prepared opinions, have ruled that the Revenue Act of 1918, which employed the same language as the Act of 1926, intended to tax husbands and wives in community property states on the income of each as determined by state law and that the wife in Louisiana and other community property states, *except California,* is the owner of one-half of the community property income and entitled to report it separately as her income. Furthermore, Congress has twice, once in 1921 and again in 1924, rejected amendments to the Revenue Act, which would have expressly taxed "community income" to the spouse having the "management and control" of the community property. The amendments were presented by the Treasury Department and were designed to bring about the result which the Government is now contending can be inferred from the Act without such amendments. The long continued prior executive construction of the previous Revenue Acts containing similar language, the rejection of the two amendments referred to and the passage of the Act of 1926 in the light of this executive and legislative history amounted to an adoption of the previous construction of the executive department. Under repeated decisions of this Court the re-enactment by Congress, without change, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States vs. G. Falk & Bro.,* 204 U. S. 143; *United States vs. Hermanos,* 209 U. S. 337, 339; *National Lead Co. vs. United States,* 252 U. S. 140. This rule is applicable *a fortiori* here because Congress not merely reenacted the Revenue Act three times without change, in the light of and with the actual knowledge of the existing executive and legal construction, but explicitly twice voted down amendments designed to change such construction. The

Government's position with reference to statutory construction is therefore inconsistent both with the plain meaning of the Revenue Act, and with its executive and legislative history.

The real issue in this case is whether half of the community income belongs to the wife under the law of Louisiana, which is the test adopted by Attorney General Mitchell in his opinion suggesting these test cases (35 Op. Atty. Gen. 265).

The Government in its brief suggests that the taxation of Trustees in the Revenue Acts supports its theory that Congress intended to tax income to the individual having the enjoyment and control thereof. But a Trustee is merely required, under certain circumstances, to make a separate return for the trust estate under his administration, and in such cases the Trustee pays the tax out of the trust estate and in its behalf. The return by the Trustee for the trust estate is always separate from that which the individual who is Trustee makes of his personal income. Congress has not attempted to make X, Trustee, add to his personal income the income which he manages for Y *cestui* and pay an income tax on the combined total. The Government, however, is contending in this case that the husband must include in his individual and personal income tax return the community income of the wife which is under his management as managing partner or Trustee. If the husband in Louisiana were to be analogized to a Trustee, he would not make a single return of his income combined with the community partnership income, as the Government contends, but he would make two returns, one as an individual covering his separate income and one as Trustee covering the community income.

The marital partnership is more analogous to ordinary partnerships than to any other legal relationship and the Revenue Act does not tax the managing partner or re-

quire him to combine the partnership income with his individual income, but, on the contrary, expressly permits each partner to report in his individual return his share of the partnership income, which is the procedure adopted by Mr. Pfaff, the plaintiff in this case, and his wife.

Even if Congress could be said to have indicated an intent to tax individuals upon the basis not of ownership of income but of "management and control" or "enjoyment" or "unfettered command" the Louisiana husband cannot be taxed upon the entire community income because he has not unfettered command or control or enjoyment thereof under the Louisiana law.

The decision of this Court in *United States vs. Robbins*, 269 U. S. 315, is not decisive of this case because:

(a) That case arose in California and the decision was based primarily upon the fact that under the local decisions in California, the wife has no vested interest and ownership in the community income but merely an expectancy depending upon whether she survives her husband. In Louisiana, the wife has a vested interest and ownership in community income from the moment that the income comes into being. In short, the wife in California is not the owner of one-half the community income. In Louisiana she is.

(b) The statement by this Court in the *Robbins* case that even if the wife in California had an interest in community income, Congress not only had the power, but had shown an intent by the Revenue Act, to tax the entire community income to the husband because he had the disposition of the fund, was made by the Court without reference to the contrary construction consistently placed upon the Revenue Act by the Treasury Department upon the advice of the Attorney General and without reference to the approval of that construction by Congress which twice expressly **rejected** proposed amendments which would have specifically taxed all community income to the spouse "hav-

ing the management and control of community property." In the *Robbins* case the Government itself had limited its contentions to the point that the California wife had no real ownership but only "an expectancy," and the question as to whether the Revenue Act could be construed as imposing a tax upon any basis other than ownership had not been put in issue by any of the parties, so that no occasion existed to emphasize to the Court the legislative and departmental history which conclusively shows that Congress in dealing with the community property problem (unlike its position in dealing with revocable trusts, see *Corliss vs. Bowers,* 281 U. S. 376) had expressly refused to adopt control, as distinguished from ownership, as a basis for taxation.

(c) Even if notwithstanding its departmental and legislative history, the Revenue Act could be construed as taxing the husband upon the entire community income in every State where he alone could dispose of the fund and exercise "exclusive rights" of "management" and "enjoyment" over it, the husband in Louisiana could not be so taxed because, *unlike the husband in California dealt with in the Robbins case,* he does not under the Louisiana law exercise *exclusive* rights of *"disposition"* and *"enjoyment",* his powers being subject to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and his wife being entitled to assert those limitations. By statute the husband is expressly prohibited from donating community real estate or the whole or a quota of the movables. He may not use any portion of the community income to improve his separate estate or pay his separate debts. He may not dispose of the community income in any manner by fraud to injure his wife. The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her

share of the community property whenever the husband proves *incompetent, a bad manager, reckless or of a speculative disposition, or whenever his affairs are in such disorder as to jeopardize her property rights,* and upon such a suit the wife may obtain an injunction restraining the husband entirely from any disposition of community property. Even if the husband is a good business manager, if he is otherwise an unfaithful partner, the wife may upon a divorce proceeding provoke a dissolution and liquidation of the community partnership and upon filing such a proceeding may enjoin the husband from any disposition whatsoever of the community partnership property. In the event of a divorce, the wife is entitled absolutely and of right to an exact one-half of the community property. The court has no discretion or power to award her less. Even if it is the husband who obtains the divorce and the wife has been guilty of the most serious misconduct, as for instance, adultery, the community partnership is immediately liquidated and the wife is bound to receive one-half of the community property. The wife may will her half of the property to whomsoever she pleases, even to her paramour or concubine, and the husband has no right to complain. If the wife makes no will, her children take her share of the community property to the exclusion of the husband; this will be so although the children are the wife's illegitimate children by another man. If the wife should will to the husband one-half of the community property, he takes by inheritance and the State of Louisiana exacts from him a tax thereon and the United States itself assesses an estate tax upon the amount so inherited even though it comprises solely the wife's interest in the earnings which the husband has made during marriage by the practice of his profession or the exercise of any other form of effort.

Not one of these limitations upon the husband (except for a restriction in the matter of gifts) existed in the *Robbins* case nor does the California wife enjoy any of the

rights of the Louisiana wife set out in the foregoing summary.

Garrozi vs. Dastas, 204 U. S. 64, cited in the *Robbins* case and also referred to in the Government's brief in this case as authority for the proposition that if the husband wastes community property in debauchery, the wife has no redress, arose under the law of Porto Rico and would not be followed in Louisiana. This was expressly held by Judge Dawkins in his opinion in the District Court in the present case (R. 24-5). The law of Porto Rico, which was involved in the *Garrozi* case was based entirely upon the law of Spain. The law of Louisiana is conceded by the Government to have unique features (Government's brief, page 25). While deriving some of its provisions from the Spanish law (since Louisiana was under Spanish rule in the latter part of the 18th Century), the law of Louisiana is chiefly modeled upon the Code Napoleon, more than half of the articles of the Louisiana Code on the subject of community property being literally copied from the Code Napoleon. This Court itself in the *Garrozi* case recognized that the powers of the husband are less extensive under the Code Napoleon and the law of the countries which have followed that Code than under the Spanish system.

The decision of this Court in *Corliss vs. Bowers,* 281 U. S. 376, does not support the construction of the Revenue Act or the basis of taxation urged by the Government in this case because:

(a) The only question involved in the *Corliss* case was the constitutionality of a particular amendment to the Revenue Act of 1926. The amendment in question *expressly* provided that the grantor of a revocable trust should be taxed upon the income therefrom. The intent of Congress was clearly expressed in making this exception to the general rule of the income tax law, which taxes individuals on the basis of ownership. The only question involved was whether the amendment expressly establishing this

exception to the general rule was constitutional. In the present case, not only is there no express provision in the Revenue Act taxing community income to the husband because of his control, but on the contrary, the Act, as construed and interpreted by the Treasury Department and the Attorney-General, permits husbands and wives to make separate returns including in their returns the income of each, as determined by local state law and Congress has expressly indicated its approval of such construction by the re-enactment of the Revenue law in the light of this long executive construction and by twice expressly rejecting amendments designed to establish a different rule and to tax the entire community income to the husband. In the present case, the Government is, therefore, seeking to have the Court impute to Congress an intention which it has explicitly repudiated.

(b) The reasoning in the *Corliss* case with reference to the constitutional question involved is inapplicable to the present case because the husband in Louisiana has not the "unfettered command" of the community income, but, on the contrary, he is analogous to a managing partner, trustee or agent and is subject in his administration of the community partnership property to all of the substantial limitations and restrictions and the wife is entitled to all the powers and rights previously described in this summary.

The fact that the husband may be held for community debts after community assets have been exhausted while the wife may restrict her liability to her share of the community assets, is not inconsistent with the spouses' equal ownership of the community property. The husband's liability is secondary and he is entitled to reimbursement by the community for any community debt which he pays out of personal assets. The statutes of various common law states authorize limited or special partnerships in which general partners having the management and control of the partnership property are personally liable if partnership assets are

insufficient to pay partnership debts, while at the same time the liability of the special partner, who has no part in the management or control of the partnership property, is limited to his or her share of the partnership assets. The positions of the husband and wife in the Louisiana community partnership correspond substantially to that of general and special partners, each of whom under the Revenue Act returns separately his share of the partnership income. Another analogy to our situation is found in the law of Spendthrift Trusts where the powers of the trustee are broad and the beneficiary has substantially no powers, the property owned by the beneficiary being not alienable by him or her and not subject to seizure for his or her debts. The trustee in a Spendthrift Trust files under the Revenue Act a separate return for the income of the trust estate, which is not taxed to him personally and not cumulated with the income belonging to him.

While it might be theoretically desirable that all Federal tax laws should produce identical results, this cannot happen so long as State law determines to whom income belongs. Attorney General Mitchell has himself expressly held in this very case that State law must control the question of ownership. (Opinion of July 16, 1927, 35 Op. Atty-Gen. 265). The Treasury Department is daily applying this rule in the application of the estate tax law. When State laws are given effect, differences in results under the Federal tax laws cannot be avoided. Thus, in some States, contractual or conventional partnerships between husband and wife to carry on a business are permitted and from these arrangements flow a division of income subject to the application of the Federal tax laws which could not be had by agreement in Louisiana where contracts between husband and wife are prohibited. So in many common law States property may be held under a contractual tenancy by the entirety which effects a division in income subject to the application of the Federal tax laws.

Such a contract or tenure is unknown in Louisiana. Unless we abrogate the well settled rule referring to State laws for determination of questions of ownership, identity of practical results in operation of the Federal tax laws cannot be attained.

As a matter of aggregate practical result, residents of Louisiana enjoy from the application to the community system of Federal tax laws no advantage over residents of other states. A lawyer who loses his wife in Louisiana pays estate and inheritance taxes upon one-half of his earnings accumulated since marriage (which belong to the community partnership) while a lawyer in Massachusetts pays no such taxes. The limitations upon the husbands in community states constitute practical disabilities and disadvantages, which outweigh any tax advantages. These are among the arguments which led Congress to reject proposed amendments of the Revenue laws, which were designed to provide the taxation of all community income to the spouse having the management and control thereof. Even upon a division of community income between husband and wife in Louisiana, they may pay greater aggregate Federal income taxes than a similarly situated husband and wife resident in Massachusetts as, for example, in the case where one of the spouses has separate income also

The fundamental and practical features of the Louisiana Community Partnership Law previously enumerated in this summary show clearly that the community partnership between husband and wife in Louisiana is not a fiction, but is in substance a partnership imposed by law, which creates burdens and limitations as well as privileges in relation to property rights of husbands and wives. These burdens and limitations on property rights are unknown in the common law States, and if it were true that any special benefit flowed from the community partnership in the way of separate income tax returns which the inhabitants of other States could not obtain by conven-

tional partnership agreements, such benefit would be more than counterbalanced by the multitude of legal burdens and restrictions placed upon the property rights of husbands and wives in the Louisiana marital partnership, which do not exist in the common law States (but the system establishing which those States would be free to adopt at any time if they cared to do so).

To take away from Louisiana and other community property States having similar laws the right of husband and wife to divide the community property for tax purposes, would in fact be a discrimination against such States and would not produce uniformity, but would deny a right developed from an ancient system of law, without giving the husband and wife the corresponding privileges and freedom with relation to property that common law partnerships and spouses enjoy. Absolute uniformity throughout the country in the Federal taxation of incomes of married persons could only be fairly obtained by having Congress make mandatory the taxation of the combined incomes of all husbands and wives everywhere as an entity; or, in other words, by requiring in every case the filing of a joint return, which under the present law, is optional. Such a provision would be uniform in operation throughout the country, and would remove the necessity for application of local state laws in determining property rights of married persons as between themselves.

But the controlling question involved in this case is one of law and not of politics or of practical advantage.

ARGUMENT

Our argument is divided into two parts. Part I deals with the Louisiana law as to ownership and control of community income with brief replies to the contentions of the Government with respect thereto and discussions of the *Corliss* and *Earl* cases. Part II reviews the construction and legislative history of the Federal Revenue Acts and discusses the *Robbins* case.

PART I.

A.

THE WIFE IN LOUISIANA IS OWNER OF ONE HALF OF COMMUNITY INCOME AND HAS A VESTED INTEREST THEREIN.

(1) The Civil Code of Louisiana Establishes a Marital Partnership Extending to All Acquisitions During Marriage and in Which the Wife is a One-Half Partner and Owner.

The more important articles of the Louisiana Civil Code dealing with the subject of community property are printed fully in an appendix hereto.

Article 2334 of the Louisiana Code provides that the property of married persons is divided into separate and common property; that separate property includes that acquired before marriage or by donation made to one of the spouses and also includes the wife's earnings and actions for damages when living apart from her husband or carrying on a separate business or trade; and then provides that:

> "Common property is that which is acquired by the husband and wife during marriage in any manner different from that above declared."

Article 2399 of the Louisiana Civil Code provides that:

> "Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary."

Article 2402 of the Louisiana Civil Code provides that:

> "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage,

> either by donations made jointly to them both, or by purchase, or in any other similar way * * *"

These provisions are in themselves sufficient to show that the husband is the owner of only half of the community property and that the remaining half belongs to the wife. As the term "partnership or community property" includes all property acquired during marriage, it must necessarily include all income accruing to the spouses after marriage.

The vested character of the wife's interest in such income under these codal provisions has been recognized by the decisions of the Supreme Court of Louisiana.

(2) The Decisions of the Supreme Court of Louisiana Recognize the Wife's Ownership of One-Half of All Community Income.

The latest general discussion is contained in *Phillips vs. Phillips,* 160 La. 813 (1926) where the Supreme Court of Louisiana said at page 825:

> "The wife's half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them. Rev. Civ. Code, Art. 2420. The wife's half of the community property is liable, of course, for half of the community debts, just as the half interest of one of two joint owners of property is liable for half of the debts contracted by the other joint owner under a procuration to administer and dispose of the property for the mutual benefit of the joint adventure."

In this case, the court reviewed its earlier opinions, pointing out that *Guice vs. Lawrence,* 2 La. Ann 226 was not only inconsistent with earlier cases but had been in effect overruled by later decisions, citing *Succession of Marsal,* 118 La. 212 (1907); *Succession of May,* 120 La. 692 (1908); *Beck vs. Natalie Oil Co.,* 143 La. 154 (1918); *Lieb-*

man vs. Fontenot, 275 Fed. 688 (1921); *Warburton vs. White,* 176 U. S. 484 (1900), and *Arnett vs. Reade,* 220 U. S. 311 (1911).

Phillips vs. Phillips (cited with approval in *Conrad vs. Conrad,* 170 La. 312) is the last statement of the Supreme Court of Louisiana upon the subject, and it coincides with the first statement of that Court in *Dixon vs. Dixon's Executors,* 4 La. 188 (1832), decided by the famous Court of which Judges Porter, Martin, Matthews and Bullard were members, in which Judge Porter said:

> "The rights of husband and wife in the partnership of gains, grow out of the marriage contract, **and do not originate in its dissolution** and it is impossible to distinguish between the interest proceeding from such a contract, and that which springs from any other agreement the law sanctions * * *
>
> "The Napoleon Code does not contain the provision found in the Code of Louisiana, that if the husband alienates, during coverture, the acquets and gains, with the intention of injuring the wife, she may, at his decease, bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our Code. And the exercise of such a right, does appear to us utterly opposed to the principle, that the wife has no interest in the property, until the community is dissolved; for if she has not, how can she maintain an action to set aside the alienation? **Who ever heard of a suit, the sole basis of which was, that the hopes and expectations of the plaintiff had been disappointed and defeated by the acts of the defendant?"**

In *Theall vs. Theall,* 7 La. 226 (1834), plaintiff's husband completed his will with the following clause:

> "The rest of my property, both real and personal, I wish to be divided in the following manner: that is to say, one-half of all to my wife, the other half to my brother's children. * * *"

In a contest between the widow and the other heirs of the decedent, the latter contended that the widow took only half of the community property and was not entitled

also to half of the remaining half. The Court rejected this contention, saying:

> "A testator must be presumed to know, that his own property only can be the subject of his disposition, and that he cannot dispose of *the property of others.* * * *"

(3) The Wife's Vested Interest and Ownership in Half of the Community Income Has Been Recognized by This Court in Cases Approved by the Louisiana Supreme Court.

In the *Phillips* case, the Louisiana Supreme Court cited with approval the decisions of this Court in *Warburton vs. White,* 176 U. S. 484 (1900) and *Arnett vs. Reade,* 220 U. S. 311 (1900), showing that the language used by this Court in those cases would be equally applicable in Louisiana. In *Warburton vs. White,* Justice White said:

> "* * * **Property acquired during marriage with community funds became an acquet of the community and not the sole property of the one in whose name the property was bought,** although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him not because he was the exclusive owner, but because by law he was created the **agent** of the community. The proceeds of the property when sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community. * * *
>
> "* * * **It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."**

In *Arnett vs. Reade,* 220 U. S. 311 (1911), the Court through Justice Holmes said, after referring to the decision of the Supreme Court of New Mexico there under review:

> "The Supreme Court does not put its decision upon that ground, but upon the notion that during the joint lives the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico embraced in 2030, 2031 of the Compiled Laws, 1897, referred to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and in the absence of a will shall descend, one-fourth to the surviving husband, etc. For **if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his.** The statement also directly contradicts the conception of the community system expressed in *Warburton vs. White*, 176 U. S. 484, 494, that **the control was given to the husband, 'not because he was the exclusive owner, but because by law he was created the agent of community.'** And notwithstanding the citation in *Garrozi vs. Dastas*, 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from *Warburton vs. White*. * * *
>
> "It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc, 1699, n.1. The notion may have been helped by the subjection of the woman to marital

power; 6 Laferriere, Hist. du Droit Franc. 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the **practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like dominio.** See *United States vs. Castillero,* 2 Black, 1, 227. However, this may be, **it is very plain that the wife has a greater interest than the mere possibility of an expectant heir.** For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. *Novisima Recopilacion,* Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. *Garrozi vs. Dastas,* 204 U. S. 64, 78. **We should require more than a reference to *Randall vs. Krieger,* 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States.''**

In *United States vs. Robbins,* 269 U. S. 315, the Court referred to the latest decision of the Supreme Court of California as showing that *Arnett vs. Reade* would not be followed in that State. The *Phillips* case, specifically citing *Arnett vs. Reade* with approval, shows that the contrary is true in Louisiana. This is further demonstrated by the fact that the law of Louisiana on the two points referred to by this Court in *Arnett vs. Reade* is identical with the law of New Mexico, i. e., in giving to the wife a remedy for alienations made by the husband in fraud of her rights and in providing for the descent to the wife's heirs of the wife's half of the community. See Articles 915, 2404 of the Civil Code of Louisiana.

(4) The Wife's Ownership of Half of the Community Income Has Been Likewise Recognized by Other Federal Decisions and Independent Commentators.

In *Liebman vs. Fontenot,* 275 Fed. 688 (1921), a case which arose in the United States District Court for the Western District of Louisiana, it was held that the wife's

half of the community was not subject to the Federal Estate Tax although her usufruct upon her husband's half was so subject. In the course of his opinion, Judge Jack said:

> "There is this difference in the rights of the wife to her community half of the property and her right to the usufruct of her deceased husband's community half: **The former is absolute; it belongs to her from the time it is acquired by the community.** The husband, as head of the community, has the administration of all of the community property; but, nevertheless, **the ownership rests equally in the two spouses.** Whenever the marriage relation is terminated, whether by death or divorce, the wife may demand her half of the community property in full ownership. **The putting in possession is merely the legal recognition of an existing right.** The wife's usufruct of the community half interest of the deceased husband is not an absolute right, inherent in her. She takes such usufruct only where the husband has not, by will or testament, disposed of his half of the community. Her half of the community is hers by reason of the **partnership** of acquets and gains; the community property is the joint production of the toil and efforts of the two. The usufruct of the property of the deceased spouse, however, is a thing not acquired jointly by the two, but a right transmitted from the husband to the wife, by reason of the law, where there is no adverse disposition by deceased of his community interest. * * *"

This case was decided before the present controversy was even suggested and the language which we have placed in black letters is itself a complete recognition of the proposition which we have emphasized.

The vested and present character of the wife's ownership in community income has been recognized in numerous decisions of the Federal Courts and the Board of Tax Appeals involving States whose community laws are certainly no more favorable to the wife than those of Louisiana. See *Bek vs. Miller,* 8 F. (2nd) 797 (1925); *Rucker vs. Blair,* 32 F. (2nd) 222 (1929); *McLarry vs. Commissioner,* 30 F. (2nd) 789 (1929) and decisions of the Board

of Tax Appeals in *Devaux,* 14 B. T. A. 205; *Ramming,* 6 B. T. A. 188; *Rigsby,* 6 B. T. A. 194; *Henry,* 6 B. T. A. 131; *Phillips,* 9 B. T. A. 153; *Brittingham,* 13 B. T. A. 375; *Miller,* 13 B. T. A. 1081; *O'Neil,* 16 B. T. A. 614. See also the following rulings of the Internal Revenue Bureau: S. O. 121, 5 C. B. 197; I. T. 1414, Internal Revenue Bulletin I-2, p. 170; I. T. 1268, Internal Revenue Bulletin I-1, p. 234; G. C. M. 2892, Internal Revenue Bulletin, VII-1, p. 158. See also decisions of lower courts in the present litigation: *Pfaff vs. Bender,* 38 F. (2nd) 642; *Bender vs. Pfaff,* 38 F. (2nd) 649; *Bacon vs. Hopkins,* 27 F. (2nd) 140; *Hopkins vs. Bacon,* 38 F. (2nd) 651; *Seaborn vs. Poe,* 32 F. (2nd) 916.

The vested ownership of the Louisiana wife in half of the community property was specifically recognized by the Attorney General of the United States in his opinion to the Secretary of the Treasury, dated February 26, 1921, 32 Op. Atty.-Gen. 435, embodied in Treasury Decision 3138, Internal Revenue Cumulative Bulletin No. 4, page 238. A similar conclusion was reached by Prof. Evans in an article on "The Ownership of Community Property" in 35 Harvard Law Review at page 63.

The modern French commentators upon the Code Napoleon, upon which the Louisiana law is largely based, likewise recognize the wife's half ownership in community property. See Baudry-Lacantinerie, Vol. 13, Sec. 247; Planiol et Ripert, Traite Pratique de Droit Civil Francais (1925) Vol. 8, Sections 516, 156-8.

(5) The Wife's Ownership of One-Half of the Community Property and Income Will be Recognized in Common Law States When Community Property is Removed from Louisiana to a Common Law State.

In *Depas vs. Mayo,* 11 Mo. 314, the husband and wife while domiciled in Louisiana acquired community funds which the husband invested in land in Missouri. The parties were divorced in Louisiana and thereupon the wife brought in Missouri an action to subject the land to her

right. The Court maintained her suit and held that the wife was entitled to a half interest in the land, saying:

> "It must be assumed then that Mrs. Depas was by the laws of Louisiana entitled to one-half of the estate, both real and personal, belonging to the community of which her husband was the head, and that Depas upon his removal to St. Louis invested a portion of this community property into real estate."

The Court held that inasmuch as the wife was the owner of one-half of the money which had been invested in the real estate, she was entitled to a half interest in the real estate which had been purchased. See also *T. C. Phillips, Petitioner, vs. Commissioner*, 9 B. T. A. 153 (1927); *Succession of Popp*, 146 La. 464.

The Treasury Department has also recognized this rule in the application of the Income Tax Law, in Solicitor's Opinion 121, reported in Internal Revenue Cumulative Bulletin for December, 1921, at page 197.

(6) The Wife's Interest in Community Income Is so Substantial That It Could Not Be Constitutionally Impaired by Retroactive Law.

The right of the plaintiff's wife in one-half of the community income is so substantial and the husband's power over it is so incomplete that a law which undertook to divest the wife's interest in the community income which is the subject of this litigation, would be unconstitutional. This was so held in *Dixon vs. Dixon's Executors*, 4 La. 188, and *Arnett vs. Reade*, 220 U. S. 311. In the former case, Judge Porter said:

> "If, therefore, by the law of the country where the marriage took place, a community of acquets and gains was declared to be created by the marriage, or, in the language of our Code, superinduced of right by the contract, we should think that a subsequent law, declaring there should be no further community between the persons who had entered into this engagement, would be retrospective, and as much a violation of rights vested under the contract, as a sta-

> tute would be, which would alter the obligations imposed, or impair the rights acquired, under a contract of sale or of lease."

In *Arnett vs. Reade* Justice Holmes said, speaking of the community interest of the wife in New Mexico where the legal situation is the same on this point as Louisiana:

> "We should require more than a reference to *Randall vs. Krieger,* 23 Wall. 137, as to the power of the Legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

If the husband in fact had complete dominion and control over the wife's interest in community income, there would be no constitutional objection to a statute being passed today by the Louisiana legislature providing that the plaintiff's wife in this case should have no further right in the community income for 1927 which is involved in this litigation. If the husband were the substantial owner of the income because of a complete control and power to use it as he saw fit so as to make it lawful to tax it to him as his own, it would indeed be attempting a distinction without substance to say that the Legislature could not pass a statute providing that she should have no manner of right with respect to it, could not will it away, could not obtain possession of it by a separation of property or a divorce. For if the husband substantially owns it, the wife could have no ground of complaint against a statute which took nothing from her. The decisions holding that such a statute could not be constitutionally enacted show that the wife in fact owns the interest. If she does and it cannot be constitutionally taken away from her, then it cannot also belong to the husband and be taxed to him as his own.

We pass from this review of the cases containing a general characterization of the Louisiana wife's vested ownership in community property to a summary of the particular rights of the wife and the particular limitations

upon the husband which justify the general characterization and demonstrate the real and substantial ownership of the wife.

B.

EVEN IF CONGRESS COULD BE SAID TO HAVE INDICATED AN INTENT TO TAX INDIVIDUALS UPON THE BASIS NOT OF OWNERSHIP OF INCOME BUT OF "MANAGEMENT AND CONTROL" OR "ENJOYMENT" OR "UNFETTERED COMMAND," THE LOUISIANA HUSBAND CANNOT BE TAXED UPON THE ENTIRE COMMUNITY INCOME BECAUSE HE HAS NOT UNFETTERED COMMAND OR CONTROL OR ENJOYMENT THEREOF UNDER THE LOUISIANA LAW.

(1) The Husband in Louisiana is Merely a Managing Partner, Administrator or Agent.

Article 2399 of the Louisiana Code, quoted *supra,* specifically describes the community as a partnership. Article 2404 of the Code recites that:

> "The husband is the head and manager of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without consent and permission of his wife."

These provisions upon their face make the husband a managing partner.

In *Childers vs. Johnson,* 6 La. Ann. 634 (1851), at page 641, the Supreme Court of Louisiana, in dealing with a case where moneys acquired after marriage had been used to pay a debt incurred by the wife prior to marriage, said:

> "This partnership, the intervenors, who are creditors of the community, have a right to consider as a legal entity; **like other partnerships,** it must be contemplated as an ideal being, *etre moral,* distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the

debtor of her husband for the $2000 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle **applicable to all partnerships,** which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * *"

(2) The Husband Cannot Convey Community Income Invested in Real Estate Except for Valuable Consideration Which Becomes Itself Part of The Community.

Article 2404 of the Louisiana Civil Code provides that the husband as head and master of the partnership may dispose of its revenues without the consent of his wife only by an *onerous* title. The second paragraph of the article further provides that:

> "He can make no conveyance *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage."

In *Melady vs. Succession of Bonnegent,* 142 La. 534 (1917), it was held that:

> "A conveyance by gratuitous title of immovable property belonging to the community by the husband as head and master thereof and during the existence of the said community is null and void; and the only exception to the rule of law thus announced, in Article 2404 of the Civil Code is where such a conveyance is made for the establishment of the children of the marriage."

Bister vs. Menge, 21 Ann. 216 (1869):

> "The power of the husband to dispose of the community property is limited to that of alienation by a sale or otherwise where an equivalent in

value is impliedly received for the property disposed of."

"The husband is prohibited from making any conveyance *inter vivos* of the immovables of the community by gratuitous title."

In *Radovich vs. Jenkins,* 123 La. 355 (1909), the Court said:

"The owner had parted from his wife and his apparent motive was to deprive her of her community rights in the property. The purchaser has not attempted to prove that Radovich intended to make a donation of all his real estate. Such a donation would have been void as the law declares that the husband can make no conveyance *inter vivos,* by a gratuitous title, of the immovables of the community, unless it be for the establishment of the children of the marriage."

Compare also *Snowden vs. Cruse,* 152 La. 144 (1922) and *Ramsey vs. Beck,* 151 La. 190 (1922).

The immovables of the community may represent the entire community income. The husband's power over this income is therefore subject to the substantial limitation that he can dispose of the community real estate only by selling it for value, in which event of course the consideration received is itself community property to which the wife's half interest attaches. See *Phillips vs. Phillips, supra,* citing *Warburton vs. White, supra.*

(3) The Husband Cannot Dispose of the Whole or a Quota of the Movables Except for a Valuable Consideration which Itself Becomes Part of the Community.

The second paragraph of Article 2404 makes the limitation governing donations of immovables applicable also to the whole or a quota of the movables. He can dispose of these also only by **onerous** title, which means for valuable consideration, which would itself become community property and to which the rights of the wife would attach. See *Succession of Moore,* 42 Ann. 332, at page 341, where it is said:

"Nor does this contention rest on argument alone, for the Code provides that the husband 'can make no conveyance *inter vivos* by a gratuitous title of the immovables of the community, nor of the whole, or of quota of the movables, unless it be for the establishment of the children of the marriage.' R. C. C. 2404.

"While this article primarily applies to strangers and third persons, yet it may be applied with equal propriety to a partner in community. While 'the husband is the head and master of the community,' and may dispose at will, or alienate its effects 'by an **onerous** title,' he can not divest his wife of her interest 'by a gratuitous title'."

The first paragraph of Article 2404, which provides that the husband is the head of the community, says that

"he administers its effects, disposes of the revenues which they produce and may alienate **them by onerous** title. * * *"

The word "**them**" obviously refers to "revenues" and thereby imposes a direct limitation upon the power of the husband to dispose of them except for a valuable consideration to which the wife's rights would attach.

As the District Judge in his opinion in this case held (R. 21), the effect of these provisions is that the husband may not donate either the whole of the movables or any considerable portion thereof and that he may donate particular objects of personalty *only subject to the prohibition against any act whatsoever by him which may defraud or injure the wife.* This important prohibition is discussed in the succeeding section of this brief.

(4) The Husband Cannot Dispose of Community Income by Fraud to Injure the Wife.

The last paragraph of Article 2404 of the Louisiana Code reads as follows:

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in

> support of her claim in one-half of the property, on her satisfactorily proving the fraud."

These provisions are not in the Code Napoleon (from which many of the Louisiana codal provisions were literally taken) but appear to have been borrowed from ancient laws of Spain as pointed out by Judge Porter in the *Dixon* case quoted *supra.*

The Supreme Court of Louisiana has indicated its opinion that in a case where the wife can show that the husband has alienated property of the community in fraud of her rights, she may obtain protection by obtaining a separation from bed and board or a separation of property upon proper proof. See *Smallwood vs. Pratt,* 3 Rob. 132 (1842), where, after quoting Article 2373 of the Code of 1825, corresponding to Article 2404 of the present Code, the Court said:

> "Although this law seems to contemplate only the case of a dissolution of the community by the death of the husband, yet the wife would not, perhaps, be without relief in case of a separation from bed and board were it proved that the husband had alienated property of the community in fraud of her rights."

The decisions hereinafter referred to show the tendency of the courts of Louisiana to permit a wife to obtain a dissolution of the community by a separation of property whenever she can show that her husband is an unreliable administrator; and a conveyance of the community property in an attempt to injure the wife would under these authorities undoubtedly entitle the wife to demand an immediate separation of property, a dissolution of the community and the making good of the injury done to her. So, also, as hereinafter indicated, even if the husband's business management has given no ground of complaint but his personal conduct has been such as to entitle the wife to a separation from bed and board, she may, in proper proceedings, obtain retribution for any injury done to her by disposition of community property in fraud of her

rights and an injunction against his further administration of the community property.

(5) Whenever the Husband Proves a Bad Manager the Wife May Obtain a Dissolution of the Community Without Seeking a Divorce or Personal Separation and May Enjoin the Husband from Further Management of Community Partnership Property.

The Louisiana law protects the wife against her husband even in the absence of fraud when he is a *reckless administrator* and is *mismanaging the community* or when *the disorder in his affairs endangers her property rights.* In such cases, the wife in Louisiana can immediately demand a separation of property which carries with it a dissolution and liquidation of the community. It is to be particularly noted that this right to sue for a separation of property and provoke a dissolution of the community can be exercised by a wife living with her husband without involving in any way a divorce or personal separation.

A separation of property in Louisiana is entirely different from a separation from bed and board. A separation from bed and board is a personal separation and a step towards divorce. See Articles 140 to 161 of the Louisiana Civil Code. Separation of property which is provided for by Articles 2425 to 2437 of the Louisiana Civil Code, quoted in the appendix, has no relation whatsoever to divorce or separation from bed and board. A separation of property may be had while husband and wife continue to live together in the utmost personal devotion and is similar to a dissolution and liquidation of an ordinary partnership. A separation from bed and board entails a separation of property (Louisiana Civil Code Article 155), but a separation of property does not imply a separation from bed and board.

It is well settled in Louisiana by the cases hereinafter cited, not only that a separation of property may be

obtained by the wife when the husband *mismanages* the community partnership property, or his *affairs are in disorder,* but that the wife obtaining such a separation of property is also entitled to *immediate dissolution and liquidation of the community partnership property.* The wife under such circumstances receives immediate possession and control of her half of the community property existing at the date of the separation of property, free and clear of the future administration and control of the husband, and by virtue of the dissolution of the community each spouse thereafter manages his or her property and all property thereafter acquired belongs as separate property to the spouse acquiring it. See *Davock vs. Darcy,* 6 Rob. 342 (1844) *Jones vs. Morgan,* 6 Ann. 630 (1851); *Wolfe & Clark vs. Lowry,* 10 Ann. 272 (1855); *Mock vs. Kennedy,* 11 Ann. 525 (1856); *Webb vs. Bell,* 24 Ann. 75 (1872); *Vickers vs. Block,* 31 Ann. 672 (1879); *Chaffe vs. Watts,* 37 Ann. 324 (1885); *Brown vs. Smyth,* 40 Ann. 325 (1888); *Walmsley vs. Theus,* 107 La. 417 (1902); *Gastauer vs. Gastauer,* 131 *La.* 1 (1912); cf. opinion of District Court in this case, R. 21.

The doctrine of these cases was recognized and followed by this Court in *Carite vs. Trotot,* 105 U. S. 751 (1881).

The reasoning adopted in the cases cited indicates that the wife may sue for separation of property whenever the husband proves a bad or reckless manager and *a fortiori* whenever he disposes of community income to injure her rights. In *Jones vs. Jones,* 119 La. 677 (1907), the Court indicated that the wife might invoke this remedy upon proof that the husband was of a *speculative disposition* and daily incurring debts. This decision was cited with approval in *Larose vs. Naquin,* 150 La. 353 at 358 (1922).

When the wife sues for separation of property, she may immediately obtain an injunction restraining the husband from further dispositions of community property.

This is specifically provided for by Article 298 of the Louisiana Code of Practice which recites that:

> "Art. 298. The injunction must be granted and directed against the defendant himself in the following cases: * * *
>
> "6. When a woman has sued her husband for a separation of property or for a separation from bed and board and fears that he will during the pendency of the suit dispose to her prejudice of the property either held in the community or on which she has a privilege for her dotal rights."

The wife is also entitled upon suing for a separation of property to an **accounting** from the husband for community income or property in his hands and **to reimbursement and retribution for any act done by him in fraud of her rights.** See *Hill vs. Hill,* 115 La. 489 (1905); *White vs. White,* 159 La. 1065 (1925), and *Smallwood vs. Pratt, supra.*

This right of the wife to force a dissolution and liquidation of the community, in case the husband is guilty of mismanagement, or his affairs are in disorder, is a serious limitation and check on the husband's authority as manager of the marital partnership and a substantial safeguard established for the benefit of the wife and the protection of her property rights. This very practical remedy given by the Louisiana law to the wife is consistent only with the theory that the husband is an administrator or managing partner, and that the wife has a real ownership in half of the community property administered by the husband, which the Louisiana courts will protect. In California and common law states there is no such restriction placed on the husband in relation to property, because the husband in California and common law states is complete and unqualified owner of all property acquired by him subsequent to marriage.

(6) Even If the Husband is a Good Business Manager the Wife May Terminate His Administration by Suing for Divorce or Personal Separation Whenever He is Guilty of Misconduct and May Then Enjoin Him from Further Management or Disposition of Community Property.

The wife's right to terminate the husband's management and to take possession and control of her interest in the community property may be asserted not only when the husband has proven a bad business manager or has been guilty of fraud in the administration of the community property but whenever he proves an unfaithful partner or an unworthy husband. Thus, the wife may sue for a separation from bed and board for any one of the seven causes provided in Article 138 of the Civil Code, including habitual intemperance, cruel treatment, abandonment, adultery, defamation and conviction of an infamous crime. A separation from bed and board carries with it an immediate separation of property and a dissolution of the community under the provisions of Article 123 of the Civil Code. Article 159 provides for a similar result in the case of a divorce.

> "Art. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains."

(Note: Since Act 94 of 1916, the wife never requires the husband's authorization.)

> "Art. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them."

During the pendency of the suit for separation, the wife may under Article 149 of the Civil Code and Article 298 of the Code of Practice obtain an injunction restraining the husband from disposing of the community property

and under Article 150 of the Civil Code, from the day on which the separation action is instituted, the husband is ousted as administrator of the community. The Articles of the Civil Code read:

> "Art. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables and immovables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.
>
> "Art. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife."
>
> See also Articles 123, 136 and 155.

The provisions of these Articles are frequently invoked. See *Dillon vs. Dillon,* 35 La. Ann. 92 (1883); *Succession of LeBesque,* 137 La. 567 (1915); *Crochet vs. Dugas,* 126 La. 285 (1910); *Williams vs. Goss,* 43 Ann. 868 (1891); *McClelland vs. Gasquet* 122 La. 241 (1908):

In the case last cited, the Court said:

> "As relates to the law, we have this to say: A wife who has sued for separation from bed and board has a right to an injunction if there is danger that the husband will dispose of the property on which she has a right during the pendency of the suit; that is, when he is about to dispose of **community property** to her prejudice, or property on which she has a privilege or dotal right. The community property of spouses falls *eo nomine* under the terms of the law."

In *Hill vs. Hill,* 115 La. 490 (1905), the Court held that:

> "Where a wife obtained judgment of separation from bed and board and subsequently sued for partition of community property in settlement of accounts, **held** that the **burden of proof was on the husband to account** for all community property

> shown by his books to have been in his possession a few months prior to the dissolution of the community."

See also *White vs. White*, 153 La. 313 (1923), 159 La. 1065 (1925) where the husband was required to account elaborately to the wife for community property in his hands when the divorce suit was filed.

In *Lockhart vs. Dickey*, 161 La. 282 (1926), the husband had sued for a separation from bed and board on the ground of abandonment. While the suit was pending, the husband purchased stock in a Building Association for which he paid with moneys which he had made prior to the filing of the separation suit. He caused the certificates for the stock to be issued in the name of another woman (the defendant, Dickey). Thereafter, the husband died and the widow joined in a suit against the defendant, Dickey, alleging that the stock had been registered by the husband in defendant's name as a

> "fraudulent simulation intending to cover up the said stock and screening it against the community claims of the wife from whom he was then seeking a separation and to whom he would have to account for one-half thereof. (R. C. C. Art. 2406). * * *"

The court held the wife entitled to prevail because

> "The whole transaction was a simulation pure and simple, done by the husband for the sole purpose of covering up the property and screening it from the knowledge and claims of his wife."

(7) Even If It is the Wife Who Has Been Guilty of Misconduct and It is the Husband Who Obtains the Divorce, the Wife is Still Entitled to One-Half of the Community Income.

A wife in Louisiana, who is guilty of adultery or any of the numerous other causes justifying a divorce or separation from bed and board, and from whom the husband obtains a divorce, is still entitled, under the law, to one-half of all of the community property, which is synonomous with all income accrued since marriage, irrespective

of the fact that she may have contributed nothing to those earnings, and that they may be due to the unaided efforts of the husband, to whom she has been a burden rather than an aid. She has the unquestioned legal right in Louisiana even under such circumstances, to obtain a liquidation and dissolution of the community partnership, and to require the husband to deliver to her half of all of the community partnership property, for the reason that it belongs to her as part of the community partnership assets acquired during marriage. This result follows necessarily from the express and unconditional provisions of the Articles of the Code heretofore quoted which provide that the husband's administration ceases and that the community partnership is dissolved and must be liquidated upon the granting of a separation from bed and board or a divorce without reference to the cause therefor and without reference to which spouse obtains the divorce or separation or which of them is at fault. See also *Nichols vs. Her Husband,* 7 La. Ann. 263 (1852); *Ford vs. Kittredge,* 26 La. Ann. 190 (1874); *Crochet vs. Dugas,* 126 La. 285 (1910); *Succession of Le-Besque,* 137 La. 567 (1915). The court decreeing the separation or divorce has no discretion in the premises. It can do nothing but liquidate the community partnership and deliver to the wife her full half of the community property or income. It is bound to deliver her half to her even though she has abandoned her husband and children and eloped with another man with whom she is living in adultery. The wife's rights in this regard are entirely independent of claims which she may have for alimony which are regulated by separate statutory provisions, having no relation to community rights. See Act 21 of 1928 amending Article 160 of the Civil Code.

Contrast the position of the undutiful wife in Louisiana with her position in a common law state where, if she deserts her husband, elopes with a lover or is otherwise at fault, she may be divorced and has no pecuniary claims

of any character for alimony or otherwise. The reason for the different result in Louisiana is that the Louisiana wife as a marital partner owns one-half of the community property and when the community is dissolved by reason of divorce, even though such divorce be for her fault, her personal misconduct in no degree impairs her property right. Thus, a husband who has by many years of effort accumulated a fortune and whose wife has deserted him to live with another man may be compelled to turn over to his wife one-half of all his accumulations since marriage in order that she may share them with her lover.

It is clear from the foregoing that the plaintiff, Mr. Pfaff, in this case might, upon a separation or divorce or a separation of property at any time during the year 1927, have been required to deliver to his wife the half of the community income belonging to her and upon which he now properly objects to being taxed.

(8) If the Husband Uses Community Income to Improve His Separate Estate or Pay His Separate Debts, His Separate Estate Becomes the Community's Debtor.

That the husband has not "unfettered command" of the community property and cannot exercise "exclusive rights" of management and "enjoyment" over it is further demonstrated by his inability to use community partnership income as he sees fit without accountability. Thus, if he uses any part of the community partnership income for the benefit of his separate estate, he becomes a debtor of the community to the extent to which his separate estate has been enhanced in value (see Article 2408 of the Code). If he pays his separate debts out of the community funds, his separate estate must reimburse the community for the actual amount so paid.

> "Article 2403: In the same manner the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, while the debts of

> both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

In *Glenn vs. Elam*, 3 Ann. 611 (1848), it was held that even if the monies used by the husband to pay his separate debts are **revenues from his separate estate,** (which under the law of Louisiana fall into the community), he becomes indebted to the community for the amount of such revenues so used and must reimburse the community therefor, the Court saying at page 615:

> "It has been contended that the Gillespie community is not entitled to recompense for the debts of the husband, paid by him during the community, out of revenues arising from his separate estate. If the revenues of the estate of the husband formed a part of the community, and we do not understand this to be questioned, their origin does not affect the right of the community to exact remuneration for the payment of debts to which they may have been applied."

Thus, in Louisiana, if a husband when married owned a piece of commercial property, and he takes the rents after his marriage to pay a debt which he owed at the time of his marriage (even, let us suppose, a debt for the purchase price of the property), he will become indebted to the community for the rents thus used. And in the present case if Mr. Pfaff had taken a portion of the salary which he earned in 1927 and used it to pay a debt which he owed when he married, he would become responsible to the community for the amount of salary thus employed; and in the event of a separation of property or if he divorced his wife today, even for her fault, she could compel him to account to her for the amount of salary which he had thus employed. What could more clearly demonstrate the wife's ownership in the community fund? If Mr. Pfaff could not use his wife's half of the salary to pay his debts without being accountable therefor, why should he pay an income tax on his wife's half of the salary which he has no right to use?

In *Dillon vs. Freville,* 129 La. 1005 (1912), it was held that if the husband exchanges separately owned immovable property for other like property with money "to boot," he and his estate become indebted to the community for the amount of the money in the absence of proof that the money was his separate property. The right of the wife to assert a demand against the husband's separate estate for community funds used by him to improve his separate estate was again recognized in the *Succession of Casey,* 130 La. 743 (1912) and *Succession of Goll,* 156 La. Ann. 910 (1924). Compare *Childers vs. Johnson,* 6 La. Ann. 634 (1851).

Of course, if the husband had "unfettered command" over community income, or if he exercised "exclusive rights of management and enjoyment over it", he would be under no obligation to account to his wife when he used it to pay his separate debts or to improve his separate property.

It is no answer to suggest, as does the Government in its brief, that the husband's liability to the community for funds appropriated by him to the improvement of his separate property may be limited to the enhancement in value of his separate estate and may, therefore, not extend to the actual amount of community funds diverted. The point is that the husband cannot do as he pleases with the community income. It is the fact of his accountability and not the precise extent thereof that is important. Moreover, the Government concedes that the rule restricting the husband's liability to amount of enhancement in value does not apply to the use of community property for the purchase of separate property or the payment of the husband's separate debts, for the husband becomes liable for the full amount so used and no question of limiting his accountability to enhancement in value of the separate estate is open in such cases. If the husband were either technically or substantially the owner of community funds as the

Government is claiming, he would be entitled to use them as he "chooses", and would not be accountable at all or to any extent.

(9) The Husband Can, by His Will, Dispose Only of His Half of the Community and Is Powerless to Affect the Wife's Half.

The husband's lack of dominion over half of the community income is illustrated by the fact that if he makes a will disposing of this income, the will passes only his half interest therein, and is entirely ineffective as to the wife's half. If Mr. Pfaff, the plaintiff in this case, had died in December, 1927, the year here involved, leaving a will bequeathing all of the salary which he had made during the year to a designated legatee, the will would be ineffective to pass anything more than half of that salary, the remaining half being the property of the wife and beyond Mr. Pfaff's control. The correctness of this proposition requires no demonstration to a Louisiana lawyer, but it is illustrated by cases heretofore cited in this brief. See R. C. C. 915; *Theall vs. Theall,* 7 La. 226 (1834); *Ramsey vs. Beck,* 151 La. 190 (1922).

How can the husband be said to have "unfettered command" over the community income or "exclusive rights of management and enjoyment" over it when he cannot will half of it to whom he pleases?

(10) The Wife May, By Her Will, Dispose as She Sees Fit of Her Half of Community Income and Her Husband is Powerless to Prevent It.

The converse of the husband's lack of testamentary power over the wife's half of the community income is illustrated by the completeness of the wife's power of disposition of her half. The wife can will her half of the community property to any one she chooses, even to a lover, and when she dies, the husband must by agreement, or ju-

dicial partition, sell the community property and liquidate any and all business ventures in order to deliver the value of half of the marital partnership property to the legatee of the wife. (Civil Code Articles 915 and 916; *Succession of Hayes,* 33 La. Ann. 1143; *Succession of Moore,* 40 La. Ann. 531). So, even a wife guilty of adultery might leave her half of the community property to her lover; and if she had not lived in open concubinage with him, so as to come within the special inhibition of Article 1481 of the Code, her will would be entirely valid and her surviving husband would be compelled to account to her lover-legatee for one-half of all community property and income. Thus, any husband in Louisiana who made, in 1927, a substantial income which fell into the community might be compelled upon the death of his wife, to pay over one-half of that income to any person whom she had designated. Yet, the Government in this case contends that he is subject to a tax upon that part of the income which is thus within his wife's control!

It is only on the theory that one-half of the community belongs to the wife that the law gives her the right of testamentary disposition of half of the community partnership property and income. At common law and in California a wife cannot, by will, dispose of one-half or any amount of the property acquired by the husband during the marriage since it belongs solely to the husband, and the wife has no interest whatsoever therein.

(11) If the Wife Dies Intestate, Her Half of the Community Partnership Property and Income "Descends" to Her Heirs and Her Husband is Powerless to Prevent It.

The above rule is expressly announced in the Revised Civil Code of Louisiana.

> "Art. 915. When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community pro-

perty, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse." (As amended by Act 160 of 1920, p. 250.)

In *Bossier vs. Herwig,* 112 La. 539 (1904), the Court said:

> "This Court has repeatedly held that when the community is dissolved by the death of the wife, the interests of the wife's heirs at once attach. *Germay vs. Gay,* 9 La. 580; *Addison vs. N. O. Savings Bank,* 15 La. 529; *Tugwell vs. Tugwell,* 32 La. Ann. 848; *Murphy's Heirs vs. Jurey,* 39 La. Ann. 785; *Glasscock vs. Clark,* 33 La. Ann. 584; *Dumestre's Succession,* 42 Ann. 411; *Landreaux vs. Louque,* 43 La. 234."

In *Brooks vs. House,* 168 La. 542 (1929), a case which came to the Supreme Court on a certificate from the Court of Appeal applying for instructions, it was held that even the illegitimate children of the wife, born before her marriage and not the children of her husband, were entitled on her death to inherit her share of the community estate to the exclusion of the surviving husband.

(12) The Wife, Upon the Death of the Husband, Takes Possession and Administration of Her Half of the Community property as Owner and not as Heir and Since the Wife is Owner in Her Own Right of One-Half of the Community Property She is not Required to Pay Either a State or Federal Inheritance Tax Upon That Half.

Upon the death of the husband the wife takes possession of half of the community property and income in her own right and not as heir, see *Burton vs. Brugier,* 30

La. Ann. 478 (1878), and *Webre vs. Lorio,* 42 La. Ann. 178 (1890), and pays no inheritance tax to the State upon this half of the community property which she owns in her own right. *Succession of Marsal,* 118 La. 212 (1907) and *Coreil's Estate,* 137 La. 702 (1915). See also *Liebman vs. Fontenot,* 275 Fed. 688 (1921), recognizing that the half interest belonging to the wife in her own right is not subject to the Federal Estate Tax (which has never been questioned by the Federal Tax authorities).

The rules we have stated are settled law in Louisiana. At common law all of the property acquired by the husband during marriage belongs to him alone, and, accordingly, upon his death *descends* to *his* heirs and his heirs must pay both State and Federal inheritance taxes.

(13) If the Wife Dies, Her Heirs or Legatees Pay Both State and Federal Inheritance Taxes on Her Half of the Community Partnership Property and if the Husband Happens to be the Legatee or Heir of His Wife He is Required to Pay Both a State and Federal Inheritance Tax.

If the wife dies, the husband can acquire her half of the community income only if she wills it to him, or if she dies intestate leaving neither ascendants nor descendants; and even in these two cases, he must pay an inheritance tax to the State of Louisiana and an estate tax to the Federal Government upon the half interest which he thus acquires from his wife. See *Succession of May,* 120 La. 692 (1908); *Succession of Popp,* 146 La. 464 (1919); *Liebman vs. Fontenot,* 275 Fed. 688 (1921).

Thus, under the law of Louisiana, if a man has the misfortune to lose his wife, he must pay to the United States and the State of Louisiana a heavy inheritance tax for the privilege of inheriting from her one-half of the property which in California or a common law state would be considered entirely his. Yet, in the present case, the

Government contends that although the wife's half interest in community income does not belong to her husband so that if she dies he must pay an estate and inheritance tax thereon in order to obtain it, yet it must be considered as belonging to him for the purpose of an income tax. We submit that this is in effect blowing hot and cold at the same time.

(14) The Government's Present Contention Is Inconsistent With Its Position in the Application of the Estate Tax.

In applying the estate tax law, the Government has consistently recognized that the local Louisiana law must control in determining the interest left by the decedent; that upon the husband's death, there is accordingly taxable in his estate only one-half of the community property; and that upon the death of the wife, whether before or after the husband, there is taxable the other half of the community property. If Mrs. Pfaff, the wife of the plaintiff in this case, had died on December 31, 1927, during which year there had been accumulated a net community income, as shown by the record in this case, aggregating approximately $30,000, the Government would have asserted the right to an estate tax upon her estate and would have included in her estate one-half of this community income. Yet, if the Government's contention in this case is sound, the entire $30,000 is to be held to be the income of Mr. Pfaff individually and taxable to him. How can these contentions be reconciled? Under the State law, which is undisputably the controlling law, Mrs. Pfaff's heirs would be entitled to one-half of the 1927 accumulated income, and Mr. Pfaff would have to make settlement with his wife's heirs for that amount. If, however, the Government prevails in the present case and Mr. Pfaff is taxed as owner of the entire community income, the inconsistent and logically indefensible situation is presented, that while the

wife's heirs are, under the State law, entitled to claim half of the income (because under the State law the wife owns half and this half descends to her heirs) and although the Government, recognizing the controlling character of the State law, levies an **estate** tax on the wife's half of the income so inherited by her heirs, yet at the same time for **income** tax purposes the Government has undertaken to tax the **same** income to the husband as his property!

C.

REPLIES TO CONTENTIONS OF THE GOVERNMENT

The Point Made by the Government That the Husband Cannot, While the Wife Can, Avoid Personal Liability for Community Debts, Does Not Indicate That the Wife is Not Joint Owner of the Community Partnership Property Since the Husband Must be Reimbursed by the Community and the Wife's Position Corresponds to That of a Special Partner.

The Government concedes (its brief, page 34) that the husband cannot be personally held for community debts until the community property has been exhausted. This fact and the further fact that if the husband does pay community debts out of his separate estate he is entitled to reimbursement (C. C. 2403, 2409), show that his liability for community debts is only that of a surety. Moreover, the power to renounce given to the wife is nothing more than a limitation of her liability for community partnership debts to her share of the community partnership property corresponding to the limitation of liability enjoyed by a *special* or silent partner in a limited partnership, now recognized, we believe in every common law state, or, as it is called in Louisiana, a partnership *in commendam*. Such a *special* partner is under no personal liability beyond the share which he has contributed to the partnership capital; and such a partner cannot participate at all in the management or control of the partnership enterprise. See Rowley on Partnership, Section 1000. Com-

pare Articles 2839 *et seq.* of the Louisiana Civil Code, including particularly Articles 2844 and 2849. So the husband's position as managing partner corresponds to that of a general partner in a limited partnership. While the special partner's liability is limited to his share in the partnership assets, the liability of the general partner is unlimited because it is he who has the control and administration of the partnership. The same result and the same reasons for that result apply in the case of the husband as managing partner of the community. The husband's unlimited liability for community debts and the wife's limited liability for such debts are, therefore, no more determinative of their respective rights as owners of the community property and income than are the corresponding liabilities of the special partner and the general partner in determining their property rights. The wife is the owner of one-half of her community partnership's income just as the special partner is the owner of his share of his partnership's income. Both the general and special partners in a limited partnership are everywhere taxed by the Government for income tax purposes upon their distributive shares of the partnership profits (notwithstanding the special partner's freedom from liability for partnership debts in excess of his capital contribution) as indeed every other kind of business partner is, whether the profits are actually distributed or not; and so, the wife, as a partner in the marital partnership, is and should be taxable on her distributive share of the community partnership income, notwithstanding her freedom from liability for community debts exceeding community assets. Conversely, the husband is not taxable upon the wife's share; he is taxable only upon his share, and is no more taxable upon the entire partnership income than is any managing partner.

The Wife's Interest is No More "Residuary" Than Any Partner's Interest in Partnership Assets.

The same general partnership analogy answers the Government's emphasis upon the fact that the wife's interest in the community partnership is residuary in the sense that, in case of a dissolution of the partnership for any cause, she receives one-half of the community assets and profits only after payment of community debts, and also in the sense that all she may leave by her will or that her heirs may inherit is a half interest in the assets of the community partnership remaining after the payment of community debts. This is equally true of the husband's interest, and the circumstance referred to would, therefore, certainly not justify the taxation of the entire community income to the husband. Beyond this, the circumstance is clearly true of every partner. No partner could dispose of his interest in a partnership except subject to liability for his share in partnership debts, and in this sense the ownership of all partners is "residuary". This is particularly obvious in Louisiana where every partnership is treated as an entity.

Compare *Claiborne & Mather vs. Their Creditors*, 18 La. 501 (1841):

> "It is the general and settled jurisprudence, that on the dissolution of a partnership all debts due must be first paid, before there is a division among the partners; the fund remains a common stock, and pledged for the payment of the debts of the firm * * *
>
> "Creditors have a right of preference or privilege on the partnership fund, to be first paid; and no partner can assign his share, until the debts of the firm are paid."

In *Dixon vs. Dixon*, 33 La. Ann. 1370 (1881) at page 1374, the Supreme Court of Louisiana directly recognized the analogy between the ordinary partnership and the community partnership upon the point herein under discussion, saying:

> "The interest of the widow in community is residuary only, resembling the interest of an individual partner in the partnership property. It can

only be ascertained and defined after a settlement of the marital partnership."

The wife's interest in Louisiana does not differ in substance from that of any ordinary member of a partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. A partnership agreement vesting in one of the partners exclusive powers of management and control might be made to terminate only after a definite period of years, with a provision that meanwhile none of the profits should be withdrawn or distributed to the partner. In such a case, when the partnership is dissolved and liquidated at the end of the term provided in the partnership contract, each partner will receive one-half of the assets and profits only after the payment of partnership debts. In case such a partnership is dissolved before the expiration of the term provided in the contract, because of the mismanagement of the managing partner, or some breach of his fiduciary obligation (analogous to a separation of property between husband and wife in a marital partnership), each partner will be entitled to receive in liquidation his half interest in the partnership assets and profits only after the payment of all partnership debts, and in this sense the interest of all partners is, of course, "residuary". Such a case, as we have supposed, would present a situation practically identical with that here involved. The entire partnership income in such a case is not taxable to the managing partner as his. Notwithstanding the fact that the profits were not annually distributed or distributable, and notwithstanding the fact that each partner's interest in the partnership income was of "residuary" character (because it might conceivably be lost by subsequent operations), each individual partner would be required under the Revenue Act to return for taxation each year his share of the profits. Each partner could dispose by will only of his residuary interest in the partnership assets after the debts had been paid. The

position of the Louisiana wife is in all respects the same. Her power under the Louisiana law to control the husband's management in case of dishonesty or for fraud or incompetency by provoking a separation of property is at least as great as the power of any partner in such a case as we have supposed.

The Fact That the Husband is the Proper Party to a Suit Involving the Community Partnership, and that the Wife May Not Bring Suit and is Not a Necessary Party, Does Not Indicate That the Wife is Not Joint Owner of Community Partnership Property in Louisiana.

With certain exceptions, such as suits for separation from bed and board or for divorce, suits for a separation of property, and suits to obtain administration of the community property in case of insanity or absence of the husband, it is true that the husband and not the wife is the proper party to stand in judgment for the community partnership. This general rule is consistent with the Louisiana law and public policy, giving the husband the administration of the community partnership, and is not inconsistent in any way with the wife's existing ownership of half of the community property. A trustee, as a general proposition, can sue and be sued without joining the *cestui que trust,* when the suit is in connection with the administration of the trust property, and this does not affect the legal relationship of the trustee and beneficiary. See R. C. L. "Trusts," Par. 205, *Carey vs. Brown*, 92 U. S. 171. In England and in many states, by statute, suits may be brought by or against a partnership represented by one partner, and it is not necessary to join other partners. See R. C. L. "Partnership," Par. 156. An executor or administrator is usually given the right by local statutes to sue and be sued. In many states, an infant can sue and be sued only through a guardian under court supervision, and the ward has no control of any kind over the litigation. It has never been suggested that such procedural and administrative regulations in relation to the right to sue and be sued,

based on public policy, altered or destroyed substantial property rights. Prior to 1916 the Louisiana wife could not stand in judgment alone even in suits relating to her separate property. Yet no one would have argued that she did not own the property. So, we submit, giving to the husband, as administrator and managing partner of the community, the right to sue and be sued in connection with the handling of its business affairs, in no way detracts from the wife's fundamental property rights and cannot be urged as an indication of ownership in the husband.

The Wife's Interest in the Community Partnership Assets is Liable for Her Separate Debts and May be Reached by Her Separate Creditors.

It is true in Louisiana that just as an ordinary partnership is not liable for the individual separate debts of any partner, so the community partnership is not liable as such for the debts incurred by the wife alone which constitute her separate debts. The wife's interest in the community property may however be reached eventually by her separate creditors. Compare Article 2433 of the Louisiana Code which reads:

> "The personal creditors of the wife can not, without her consent, petition for a separation of property between her and her husband.
>
> "Nevertheless, in case of the failure or discomfiture of the husband, they may exercise the rights of their debtor to the amount of their credits."

See also *Rawlins vs. Giddens,* 46 La. Ann. 1136 (1894), *Pior, Tutor, vs. Giddens,* 50 La. Ann. 216 (1898), pointing out the method by which separate creditors may reach the interest of either spouse in the community upon its dissolution. In a State like California, where the wife had a mere expectancy, there would be no interest in the community which her separate creditors could reach if she died before her husband. In Louisiana, the right of her separate creditors to reach the wife's interest in the community property is a present and vested one although the

exercise of it must be deferred until the community is dissolved. Even if the wife were described as enjoying a temporary exemption, during the continuance of the community, from the seizure of her interest therein for her separate debts, that fact would not alter or impair her ownership in the property. Even if a man's property be entirely and permanently exempt from seizure, it would still remain his property, and in this case the wife's property interest in the community assets is not exempt from seizure for her debts but may be levied upon and taken to pay the same whenever the community is dissolved.

The Exemption of the Community Property From Immediate Liability for the Wife's Separate Contracts and Debts, and the Conferring on the Husband the Power of Administration of the Community Property, Reasonably and Naturally Results from the Fundamental Policy of the Louisiana Law in Connection with the Regulation of the Marital Partnership, and Does Not Indicate that the Wife is not Joint Owner of Community Partnership Property in Louisiana.

It is true in Louisiana that the wife has no right, as a general proposition of law, to make independent contracts (other than for necessaries) binding the community without the husband's consent. To permit the wife to make contracts affecting the community partnership or to exercise her independent discretion in relation to the investment and administration of the community funds would be contrary to and inconsistent with the fundamental policy of the community partnership law which gives to the husband the discretionary control and administration of the community, so long as the partnership is not dissolved for one of the various causes provided by law and so long as the husband is an honest, competent and capable administrator and faithful to his fiduciary obligations. If the husband is not *incompetent* or a *bad manager,* or *dishonest* or *guilty of disposing of property in fraud of the*

wife's rights, or if his *affairs are not in disorder,* (all of which are grounds for a separation of property, a termination of his administration and a dissolution and liquidation of the community partnership) the Louisiana law considers the husband the proper person to be given liberal discretion and control with regard to the management of the business affairs of the marital partnership without interference by the wife and the necessary confusion that would result from *dual control.*

The exemption of the community property from liability for the wife's separate debts is based on the same theory. If the wife could make valid independent contracts without the consent and concurrence of the husband which could be enforced against the community partnership property, the husband's control as managing partner would be indirectly destroyed. The wife's ability and power to bind the community for her separate debts and separate independent contracts would, in substance, defeat and destroy the husband's control and discretion in the administration of the community partnership property just as effectively as if the law had specifically given the wife the right to act independently in connection with community contracts without the consent of her husband.

It is clear, therefore, that the discretion vested in the husband by the Louisiana Marital Partnership Law to manage and administer the community would be a vain and useless thing if his control and management could be harassed and defeated by the exercise of similar powers by the wife. If the wife **could contract with reference to the community partnership, or if the community were subject to her separate voluntary contract debts during its existence,** the community partnership would be broken up and endless confusion and chaos would result. Dual control would not only be destructive of the proper administration of the community partnership property, but of marital harmony as well, and would tend to bring about conflict and

dissension between husband and wife. Such is the policy underlying the law of Louisiana that prevents the wife from making voluntary contracts in relation to the community property, (except for necessaries) or subjecting community property to liability for her separate contract debts. When the above limitations on the wife's control of her property are considered in the light of the public policy of the Louisiana law, they are perfectly understandable and are not inconsistent with the wife's proprietary interest in the community partnership.

It must be remembered too, that the wife is **amply protected** when the Louisiana community system is considered as a whole, and her temporary incapacity involves no hardship in view of the other safeguards afforded her. For example, the husband is obligated to supply out of the community all things necessary and proper for the wife's support and comfort, and the wife, in case of a neglect of this duty by the husband, is given the legal right to require it. Furthermore, the wife, although denied the right to interfere with the husband's wise and honest administration of the community partnership property, is, nevertheless, given the right to take possession of her half of the property and remove the husband as administrator, if he is reckless and guilty of mismanagement, or his affairs are in such disorder as to jeopardize her property rights. Moreover, she can hold him accountable if he gives the community property away, uses it for his private advantage, e. g., to pay his separate debts or improve his separate property, or if he disposes of it in any manner in fraud of her property rights. Finally, she can, in Louisiana, dispose of her interest in the community property by will as she sees fit, and she possesses the various other attributes of ownership heretofore outlined in detail.

It is significant to note, in connection with the discussion of the Louisiana law giving the husband, as manager of the community, discretion and control over the com-

munity partnership assets and business, that up to 1916 the husband was given a substantial control over the separate and paraphernal property of the wife. Up to 1916 in Louisiana, the wife, with minor exceptions was legally incapable of exercising the ordinary civil rights. The wife's civil incapacity not only applied to her interest in the community property, but to her **separate and paraphernal property** as well. For example, prior to 1916, a wife could not make a contract or donation, incur a debt, or file a suit, even with reference to her separate and paraphernal property, without the consent of her husband or the court after citation of the husband and a hearing of his objection. (See R. C. C. 121, 122, 123, 124, 125.) Furthermore, the wife could not accept a testamentary executorship (R. C. C. 1664), make a donation *inter vivos* (R. C. C. 1480), or accept a donation (R. C. C. 1545), although she was permitted to make her last will without the authority of her husband (R. C. C. 135, 1480). Thus as a general proposition of law and public policy in Louisiana, the wife, prior to 1916, was practically denied discretion and control both with respect to the community property and her separate property, without the consent of the husband or a judge. In 1916, the Louisiana Legislature removed the civil incapacities of the wife insofar as her separate and paraphernal property was concerned. (See Act 94 of 1916.) Her incapacity and inability to contract or sue and be sued with reference to the community (except for necessaries) were left undisturbed.

It could not have been seriously argued that because prior to 1916 the wife could not freely exercise control and administration even over her **separate property**, and because the husband and courts of Louisiana were given a large degree of control over the wife's separate property, that before 1916 the wife had no vested ownership in her separate property during marriage. Yet such an argument would perhaps be as plausible as some of those suggested in the present case and might be supported by some of

the practical considerations which are urged in the present controversy in relation to the wife's interest in the community property. The husband's administration of the community income, like the administration which prior to 1916 he exercised over the wife's separate property, does not make him owner. It is clear in the light of the statutes cited above, that the general policy of the Louisiana law has been based on the theory that the husband is the proper judge and just and final arbiter in all commercial and civil matters, and the wife has been subordinated with reference to her civil and property rights to his control and discretion in all such matters, subject, however, to the numerous safeguards given to her for the protection of both her community and separate property rights in case the husband is either incompetent or unworthy of his trust.

Analogy of "Spendthrift Trusts"

A strong parallel to the wife's position in Louisiana is to be found in the common law decisions and statutory provisions of many states in connection with the regulation of "spendthrift trusts." Most of the states recognize "spendthrift trusts," and many of them have special statutes providing for the creation of "spendthrift trusts." See Ruling Case Law, "Trusts", Paragraphs 116 to 118. It is possible for property to be put in the hands of a Trustee for the benefit of the *cestui que trust* or beneficial owner of the property, subject to the stipulated condition that the beneficial owner cannot alienate or dispose of his beneficial interest, that the trust property shall not be subjected to attachment for the debts of the beneficial owner, and that the investment, administration and control of the property shall be entirely vested in the Trustee. In such a trust the beneficial owner cannot control the management of the property, cannot decide how the property shall be spent, and cannot sell the property, nor can the property be sub-

jected to the debts of the beneficial owner. A beneficial owner, under such circumstances, cannot interfere in any way with the control and administration of the trust so long as the Trustee properly manages the property and is not guilty of fraud or a breach of trust.

No one would seriously contend that the Trustee of a "spendthrift trust" is the *owner of the property* and that as owner the income of the property should be considered as *belonging to him* for tax purposes, and that he, the Trustee, in making his individual income tax return should include in that return income from the trust property which belongs to another person, for the purpose of calculating the individual surtax of the Trustee because the trust property is under his control and administration and cannot be sold by the beneficiary or immediately subjected to the payment of the debts of the beneficiary. On the contrary, the Revenue Act specifically provides in such a case that the Trustee shall make a separate return for himself as an individual, and another separate return as Trustee for the owner of the trust property. The personal income of the individual who happens to be Trustee is separately returned and his tax thereon is calculated and paid separately. It is obvious that definitions which speak of the right to sell or otherwise dispose of property as an attribute of ownership must be considered in the light of well established exceptions to the general rule.

In the case of "spendthrift trusts," the law takes away from the beneficiary the right to sell or dispose of the trust property or his beneficial interest therein, and likewise exempts the trust property and income from liability for the debts of the *cestui que trust* during the period of the trust, on general grounds of public policy. It has however never been suggested that the beneficiaries of "spendthrift trusts" have not a vested ownership in the property held in trust, because of restriction with reference to the control and administration of the property, nor has it ever

been suggested that the trustee under such circumstances is the real owner, because of his practical control. There is no more reason in Louisiana for the suggestion that the husband, as managing partner of the community partnership property, is the owner by virtue of his administration, and that the wife has no property rights because of the temporary restrictions and exemptions that exist.

The statement in the Government's brief that the "community property is liable for the debts of the husband, but not for the debts of the wife" has been heretofore explained insofar as the wife's exemption is concerned. It is true that in Louisiana the community property is technically liable for the debts of the husband. If, however, the community partnership funds are wrongly used by the husband, as manager of the community partnership, to pay either his separate or prenuptial debts or a separate debt of the wife, the separate estate of the husband or wife, as the case may be, is indebted to the community and must reimburse the community for the expenditure in a settlement of the community partnership. It is not true, therefore, that the husband may use the community to pay his separate debts and do with it "as he pleases", since the law of Louisiana requires that he pay his separate debts out of his separate estate and if he does wrongfully use community partnership property to pay his separate debts, he must reimburse the community from his separate estate for the full amount so spent. See R. C. C. 2403; *Glenn vs. Elam, supra; Childers vs. Johnson, supra; Dillon vs. Freville, supra; Succession of Casey, supra.*

When one stops to consider the intimate, delicate and sacred relationship of husband and wife and the psychological necessities for the peaceful and happy realization of the relationship, and at the same time recognizes that the framers of the historical Civil Law Codes have woven into the marital status a practical commercial partnership, it is astonishing that the dictates of public policy

and adaptive legal philosophy, in reconciling and harmonizing the two legal relationships, have resulted in modifying and restricting ordinary commercial partnership principles so very little.

The Provisions of the Louisiana Law Are in Fact Sufficient to Assure the Wife Management upon Abandonment by Her Husband.

It is said in the Government's brief, page 36, that the Louisiana Civil Code does not contain any "express" provision which makes the wife the manager of the community upon abandonment by her husband similar to the provisions found in the laws of the other community property states. This remark is, however, followed by the statement, "See, however, Articles 57 and 64 *infra.*" The Articles of the Louisiana Code thus referred to expressly give the wife the right to administration if the husband is an absentee. Moreover, the abandonment of the wife by the husband entitles the wife to institute a proceeding for separation from bed and board, which provokes an immediate dissolution of the community and entitles the wife to the immediate delivery of her half of the community property to be administered by her as she sees fit. Such a proceeding by the wife would not dissolve the bonds of matrimony and if the husband returned and a reconciliation were effected, the spouses would continue to live together as husband and wife without remarriage. The powers of the wife upon abandonment by the husband appear, therefore, as extensive as in any other community property state.

Garrozi vs. Dastas, Cited in the Robbins Case and Quoted in the Government's Brief, Arose Under Porto Rican Law, Which is Different From That of Louisiana, and Would Not be Followed in Louisiana.

The Government quotes in its brief from the opinion of this Court in *Garrozi vs. Dastas,* 204 U. S. 64, which was cited also in the *Robbins* case. That case deals with the

right of the husband under the community property law of Porto Rico, which like the California law, is derived from the Spanish law entirely and has not been influenced by the special doctrines of any other systems. The Louisiana law, while influenced to some extent by the Spanish law (since Louisiana was under the dominion of Spain for a portion of the 18th Century), has been modeled chiefly upon the Code Napoleon, more than half of the articles of the Louisiana Civil Code having been literally copied from the Code Napoleon. In the opinion in the *Robbins* case, the *Garrozi* decision is cited in support of the statement that in California "the husband may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery, the wife has no redress." This would not be true under the law of Louisiana, as we have heretofore shown, and *Garrozi vs. Dastas* would not be followed in Louisiana. This was expressly decided by Judge Dawkins in his opinion in the District Court in the present case, in which he said (R. 24-5):

> "* * * However, there are under the Louisiana law, both in its codal provisions and as now settled by the decisions of its courts, two *decided differences* between what the Supreme Court found to be the law of Porto Rico in the *Garrozi* case, to-wit, with respect to the right of the wife to put an end to the community before dissolution of the marriage, and as to her relief against the fraudulent disposition of the common property. It is as well settled under the Louisiana jurisprudence as anything can be, that the wife during marriage, may have the community dissolved whenever the husband has been guilty of *mismanagement*, his affairs are in disorder, *he is dissipated*, or has engaged in speculation, and this whether she has or had any paraphernal or dotal property, but merely for the protection of future earnings from her own industry. * * * Then, as heretofore noted, the last paragraph of Art. 2404 of the Louisiana Code, makes the husband's estate, including his interest in the community as well as his heirs, liable for the value of her half of the community

> property which he 'has sold * * * or otherwise disposed of * * * by fraud, to injure his wife,' in an 'action against the heirs.' So that while the *Garrozi* case may have been sound authority in support of the decision of *U. S. vs. Robbins,* it does not follow that it will sustain a similar conclusion when construing the law of Louisiana. For, in the latter case, Justice Holmes found 'he (the husband) may spend it (the community income) substantially as he chooses and if he wastes it in debauchery, the wife has no redress.' *This is not true in Louisiana.* Here if the wife chooses, she may bring her action at any time when the husband's conduct puts her rights in jeopardy, and have a dissolution of the community and division of its property, including its funds and income. *Gastauer vs. Gastauer,* supra." (Italics ours).

In his opinion in the District Court in this case, Judge Dawkins also quoted the language of Justice White, the organ of this Court in the *Garrozi* case, as follows:

> "Besides, when it is considered that the ancient Spanish law and the law as formulated in the code of 1889, or in the Porto Rican code of 1902, *confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that code.*" (Italics by the writer of this opinion).

As shown by the language italicized by Judge Dawkins, Justice White himself emphasized the fact that the power of the husband under the Spanish system was in principle more extensive than under the Code Napoleon and the laws of the countries which have followed that code. In support of this statement, Justice White particularly noted the fact that under the Spanish law, no authority was conferred upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs. That right exists, we believe, only under the Code Napoleon and the law of the countries that have followed

that code. It exists, as we have shown, expressly under the law of Louisiana (being provided for by Article 2425 of the Louisiana Code which goes substantially beyond the corresponding Article 1443 of the Code Napoleon). This Court has by the language quoted in effect itself recognized that *Garrozi vs. Dastas* would not be applicable in Louisiana, the laws of which are in fact modeled chiefly upon the Code Napoleon and do expressly give the wife the right to demand a separation in the case either of disorder of the husband's affairs or mismanagement or abuse upon his part. The decisions of the Supreme Court of Louisiana leave no room for doubt but that if the Louisiana husband undertook to do what the Porto Rican husband in the *Garrozi* case did, the wife would not be without redress, as she was under the law of Porto Rico and (according to the *Robbins* case) under the law of California.

The Statutory Rights of the Wife in Common Law States are not Comparable to her Louisiana Community Property Rights.

The Government's brief suggests (pages 19, 20) that the position of the Louisiana wife may be compared with the right which the wife enjoys in other States to have a certain proportion of the husband's estate left to her if she survives him. The provisions referred to in the Government's brief appear to be provisions which make the wife to a very limited extent the forced heir of the husband if she survives him and apparently are enlargements of her common law right of dower. The rights thus assured her are not comparable in importance or extent with the rights of the Louisiana wife in community property.

(a) The rights conferred by statutes in Oklahoma, Minnesota and other States are conditioned upon the wife's surviving her husband. If she dies before the husband, she takes nothing under these statutes nor do her heirs take anything. The wife under these statutes has, there-

fore, nothing more than a hope or an expectancy. But in Louisiana, if the wife dies before her husband, her property will pass to the legatees named in her will or her other heirs and half of the husband's accumulations since marriage must be delivered to them. If she leaves her half to her husband, he must pay inheritance taxes for the privilege of taking what in Minnesota and Oklahoma would be considered his own. Moreover, during her lifetime, the wife herself has it in her power to compel the delivery of her half interest to her whenever the husband proves incompetent, dishonest or even merely speculative. The wife may elope with a lover, force her husband to divorce her and will be then entitled to the immediate delivery of her half of the property. Without undertaking to review again in detail the rights of the Louisiana wife, it must surely be obvious that in character and extent they go far beyond the statutory protection upon the husband's death which is extended to the wife in non-community States.

(b) The difference in character between the Louisiana wife's substantial partnership property rights in the community and the inchoate dower and forced heirship rights of the wife under such statutes as the Government refers to in its brief has been recognized by this Court. Thus, the wife's inchoate dower right may be constitutionally abridged or taken away by statute before the death of her husband (*Randall vs. Krieger,* 23 Wall, 137) while in *Arnett vs. Reade, supra,* in discussing the wife's community interest, this Court said:

> "We should require more than a reference to *Randall vs. Krieger,* 23 Wall, 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

So a forced heir has also merely an expectancy which may likewise be constitutionally divested by statute at any time (*Cordova vs. Folgueras,* 227 U. S. 375), but a statute

undertaking to abrogate the Louisiana wife's community interest would be clearly unconstitutional. See *Dixon vs. Dixon's Executors, supra.*

The Division of Income Between Louisiana Spouses Gives Them No Unfair Advantage.

The residents of common law states who are disposed to think that the division of community income between husband and wife in community States for Federal income tax purposes gives the latter an unfair advantage should stop to consider some of the practical results of the community property law which operate to the disadvantage of the husband. Thus they should consider the case of the husband losing his wife who must pay an inheritance tax for the privilege of obtaining one-half of the income which he has himself accumulated. They should consider also the possibility in a community State that the wife may will to any one whom she sees fit her one-half interest in all of the earnings and accumulations of the husband. They should further consider the right of a wife if the husband proves to be a bad or reckless manager, or of a speculative disposition and involving the community in debt, or if he does any act in fraud of her rights in the community income, to obtain a separation of property, enjoining him from further administration of the community income, and assuring immediate delivery to her of her half thereof. They should consider also the right of the wife upon a divorce, even if she has been guilty of the most glaring misconduct, to receive one-half of the husband's earnings since marriage. They should further consider the husband's lack of power to use what they would consider his own salary for the purpose of paying his antenuptial debts or improving his separate property. Using practical language, these are the penalties which the husband in community States pays for the "privilege" of declining to pay an income tax on the half of the income which belongs to his wife and which accrues to her.

So upon the question of practical advantage or disad-

vantage, it must be borne in mind that the earnings of the wife as well as those of the husband may fall into the marital community in Louisiana. Thus in *Hellberg vs. Hyland*, 168 La. 493 (1929), money and profits made by a wife in real estate speculation with money earned by her were held to belong to the community (even though made with money belonging to the wife's separate estate). In a common law State, the wife's earnings during marriage would be her separate property and she could make them the subject of a separate return upon which she would pay a tax based only upon their amount. If the Government's contention in the present suit is maintained, the husband would have to pay on all the wife's earnings as well as on all of his own, as well as upon dividends, rents and interest upon his wife's separate property under his administration. The accumulation of this income would, of course, increase the tax rates. The resulting tax would be much greater than in a common law State where the wife could make a separate return of her own earnings. It will doubtless be said that this would result from the peculiar provisions of the Louisiana law. But if the **supposed** provisions of the Louisiana law would justify such a result, how much more will the **actual** provisions of our law justify the result for which we contend, by which each spouse may return that half of their community or combined income which under the law of Louisiana belongs to him or to her? If we would not be entitled to complain of the hardship caused by the maintenance of the Government's contention in the present suit because of the **supposed** fact that it would result from the special provisions of the Louisiana law (when in fact it would do violence to those provisions by denying the wife's ownership of one-half of community income), then the Government and taxpayers of non-community States cannot complain of the maintenance of our position in the present case which must result not from supposed but from **actual** conditions of the Louisiana law.

Upon the practical aspects of the question, it may also be pointed out that in many common law States husbands and wives may make voluntary partnership agreements, which may accomplish the same result by convention that the law accomplishes in Louisiana. Where such a partnership agreement has been entered into between husbands and wives in those States, the Commissioner has recognized that each spouse may return his or her distributive share of the partnership income and is liable only for the tax upon such share. A list of twenty-one States in which the Government has recognized that this may be done may be found in 1930 Prentice Hall Tax Service, Section 15,507. In Louisiana, however, a husband and wife cannot become members of a conventional partnership because they cannot contract with each other (Civil Code, Article 1790). To maintain the Government's position in this case will, therefore, in fact expose Louisiana husbands and wives to the payment of greater Federal taxes than husbands and wives in other States who may by agreement establish a community partnership between themselves which the Government recognizes. The Government's position in these States is based upon a recognition and application of the local law. How could it be said that the application of our local community law in this case would accord the Louisiana husbands and wives any greater practical advantage over spouses in other States than the conceded application of the laws of such other States already accords to spouses residing therein, who by express convention establish a partnership or community between themselves?

Still another reply might be made to the argument that the maintenance of the Government's position in this case is necessary to prevent an unfair practical advantage in favor of married persons residing in community law states. There is nothing to prevent the inhabitants of any other state from adopting the Louisiana community law system and thereby obtaining for themselves all of the

supposed benefits which will accrue to the inhabitants of Louisiana from the maintenance of our position in the present suit. If the inhabitants of other states should be of the opinion that it is to their interest to place the burdens and limitations on the husband's earnings and accumulations during marriage and confer upon the wife the substantial property rights in the earnings and accumulations of the husband during marriage which the law of Louisiana confers upon her, nothing will prevent them from changing their law accordingly.

To tax the husband upon the wife's half of the community income on the theory that he has the control thereof because he is the managing partner of the marital partnership, while not undertaking to tax any other managing partner in any ordinary partnership upon the income of his partners upon a similar theory would be an unfair discrimination against Louisiana and its marital partnership law. An attempt to force the husband and wife in Louisiana, who under their local State law are partners in fact, to report the community property in the name of the husband only, when, as a matter of law and practical fact, the husband owns only one-half of the property and income and is merely managing partner for his wife of the other half, will not produce uniformity but will ignore the fundamental law of Louisiana by treating what in Louisiana is in substance a partnership created by law differently from voluntary partnerships in every common law State.

The foregoing considerations show that it cannot in fact truthfully be said that the maintenance of our position in this case would give to the inhabitants of Louisiana any advantage over the inhabitants of other States in the mater of Federal taxation. But such arguments are besides the point in any event. The question involved here is one of law, not of politics or of practical expediency. If, under the law of Louisiana, the husband is not the owner of all the community income but one-half of it belongs to the

wife, the husband cannot be required to pay Federal income taxes upon the half of such income which does not belong to him.

The illustrations given show that, since the laws of each State must determine questions of ownership, it is not possible to attain identical practical results from the operation of the Federal Revenue laws in each of the forty-eight States of the Union. In the Government's brief, it is said that uniformity is desirable. That might equally be said of every so-called commercial statute; and it might with considerable force be contended that it would be desirable for the entire body of municipal or private law in the United States to be identical. But other considerations are more important than the desirability of uniformity and it is impossible for this Court, without violence to the dual character of our Government and the settled rules which the Court has developed, to decide this case upon any principle that Federal Revenue laws must have identical practical result in every State.

No Difficulty Exists in Collecting the Income Taxes Due By The Wife in Louisiana.

We anticipate a reference in argument to the supposed difficulty of collecting the income tax due the Government upon the wife's half of the community income. The supposed difficulty does not exist. It would be the duty of the husband as manager of the community to pay the income tax due by the wife upon her half of the community income and to charge it against her interest in the community. It is clear law in Louisiana that a debt or obligation incurred by the wife during the marriage for necessaries or family expenses or with the husband's approval must be paid out of the community income. Compare *Chaix vs. Villejoin,* 7 La. 276 (1834); *Scanlan vs. Warwick,* 10 La. Ann. 30 (1855); *Cousins vs. Kelsey,* 33 La. Ann. 880 (1881); *DeLesdernier vs. DeLesdernier,* 45 La. Ann. 1364 (1893); *First Natchez Bank vs. Moss,* 52 La. Ann. 1524 at 1528

(1900); *Van Horn vs. Arantes*, 116 La. 130 (1906); *Rennyson vs. Davis*, 6 Orleans App. 251 at 253 (1909); *Gus Mayer Co., Ltd., vs. Gasquet*, 7 Orleans App. 199 (1910). Compare Arts. 119, 120 and 2403 of the Civil Code. In *Gosserand vs. Monteleone*, 159 La. 316 (1925), s. c., 164 La. 398 (1927), the community was held liable for the fees of an attorney employed by the wife to procure for her a separation from bed and board. The obligation to pay the income taxes due the United States by the wife upon a return filed by her with the express or tacit approval of her husband, covering her half of the community income, is certainly no less than an obligation to pay ordinary debts incurred with the approval of the husband or necessaries and family expenses. *Cf. Knoblock & Rainold vs. Posey*, 126 La. 610 (1910), where the community was held bound upon a mortgage made by the wife with the husband's approval. The Government could undoubtedly distrain the community funds or property to compel payment of the income taxes due upon the wife's return as well as of those due upon the husband's return. No difficulty has ever been found by the Government in collecting the income taxes due upon the separate returns of their half of community incomes which Louisiana wives have been filing for now about ten years past and to which the Government made no objection until the decision to require the filing of this suit.

The Decisions in the Corliss and Earl Cases Have no Application to this Case.

In *Corliss vs. Bowers*, 281 U. S. 376, the court was dealing with Section 219 of the Revenue Act of 1924 which expressly provided that where the grantor of a trust had at any time during the taxable year the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year should be included in computing the net income of the grantor. This new provision of the revenue law was inserted as a

clear exception to the general rule and history of the Revenue Act taxing "individuals" on the basis of ownership of income as determined by state law. This amendment specifically taxing the donor of a revocable trust was designed to meet a particular situation, i. e., to prevent individuals from establishing revocable trusts in favor of the members of their families and their friends in order to reduce income taxes, which was formerly done under the law as it had previously existed. No question was open as to the intent of Congress which was clearly expressed and the only point for argument was constitutional power. The court upheld the statute on the ground that

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income whether he sees fit to enjoy it or not."

In the present case the executive and legislative history of the Revenue Acts negative any intent of Congress to tax the community income entirely to the husband because of his powers of management and control. Congress, in fact, has twice rejected amendments which were expressly designed and worded to bring about this result. Furthermore, even with reference to the constitutional question involved in the *Corliss* case, it cannot possibly be said under the Louisiana law, as it was said in the *Corliss* case, that the community income is subject to the husband's "unfettered command".

If the husband had "unfettered command" of the community income, he could without accountability use it to pay his own debts or to improve his own property; he could donate the immovables or all or a quota of the movables in which the community income was invested; he could alienate the community income as he saw fit for the purpose of injuring and defrauding his wife; he could refuse to have his administration terminated because of fraud, speculation, bad management or the confusion of his own affairs; he could refuse to pay over to the wife one-half

of the earnings accumulated by him since marriage where she obtained a separation of property or a divorce and particularly so where the divorce had been compelled by the wife's misconduct as where she had eloped with another man; he could will the entire community income away; he could object to the inheritance of one-half of the community property by his wife's illegitimate children born to her by another man.

But the husband in Louisiana can do none of these things.

How could it be said that an individual who has none of the powers above set out had "unfettered command" of the community income?

Who ever heard of a man who had "unfettered command" of income (to use the language of the *Corliss* case) or was "free to spend it substantially as he chose" (to use the language of the *Robbins* case) being unable to use it to pay his own debts or to improve his separate estate or to conceal it or fraudulently dispose of it as he saw fit or to give it away as he pleased or to refuse an accounting to an unfaithful wife or to her illegitimate children by another man? Who could say that a man has "unfettered command" of the income or is free to do as he pleases with it where he has only a power of management similar to that of a managing partner which his wife can terminate by demanding a separation of property which involves a dissolution of the community and an accounting of the community property in the hands of the husband whenever his affairs are in disorder or he proves an incompetent or faithless manager?

In *Lucas vs. Earl*, 281 U. S. 111 (1930), the salary and attorney's fees were earned by the husband and under the law of California were owned by him. He attempted by special contract with his wife to procure a different result. It was held that as the salary vested in him when it was earned, it was all taxable to him and this result would

not be prevented by a contract requiring him to share it with his wife *after* it had accrued. In the present case, the wife's interest in the community income vested from the moment of its accrual. From that moment, the husband's dealings with it were subject to the limitations already fully set forth. There was never a moment when the income vested in the husband free of those limitations. Moreover this result flowed from the Louisiana law and not from any special contract.

PART II.

A.

The Language and Terms of the Revenue Act of 1926, as Well as the Similar Language Contained in the Previous Acts, Standing Alone, Clearly Authorize the Filing of Separate Returns of Community Income by Husband and Wife, and Cannot, as a Matter of Independent Statutory Construction, be Interpreted as Taxing the Husband in Community Property States on the Half of the Community Income Which Belongs to and is Owned by the Wife.

(1) Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Returns the Income of Each Spouse.

Each of the statutes levying income taxes undertakes to tax the net *income of each individual citizen* of the United States.

The Revenue Act of 1926, under the heading of "Individuals" and under the heading of "Individual Returns", contains the following pertinent sections:

"Individuals.

Normal Tax.

"Sec. 210 (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon*

the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, etc.

Surtax.

"Sec. 211 (a) In lieu of the tax imposed by Section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns.

"Sec. 223 (a). *The following individuals shall each* make under oath a return stating specifically the items *of his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

"Sec. 223 (b) *If a husband and wife living together* have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income, for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

"Sec. 216 (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*" (Italics throughout above quotations ours).

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns,

or consolidated in a single return. The language of the statute quoted above expressly and clearly authorizes the filing of separate returns by husband and wife to eliminate the calculation of their tax liability "on the aggregate income". This construction of the statute, clear upon its face, has been approved expressly or tacitly by every Attorney General who has considered the point. In Louisiana, Texas, Arizona and Washington community income has been divided between husband and wife in their Income Tax Returns on the basis of joint ownership, for many years, in accordance with the Rules and Regulations of the Internal Revenue Department specifically established by the Internal Revenue Bureau in accordance with an opinion rendered by the Attorney General of the United States. This was the procedure followed by the plaintiff and his wife in this case.

The language we have quoted from the Revenue Act of 1926 pertinent to this discussion is the same as the language of the preceding Revenue Acts dealing with this subject.

(2) The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.

The marital partnership or community cannot by any stretch of the imagination be held to come within the meaning and description of *Trusts,* as defined and described in the Revenue Act of 1926. (Section 219a). The legal history of the community partnership and its attributes and relationships are *sui generis* and have never been described or defined by either the civil or common law jurisprudence and text book writers as *Trusts,* as known to and defined by the common law. It is not even contended in the government's brief that the community partnership is a *Trust* within the meaning of the Revenue Act of 1926. It is suggested inferentially, however, in the government's brief

that the husband as manager of the community partnership is analogous to a trustee and that trustees are required under certain circumstances to pay an income tax on the trust property under their control. The analogy suggested, upon analysis, is clearly fallacious but if it were well founded, the analogy would be in favor of the taxpayer in this case rather than the Government. It is to be particularly noted that a trustee is merely required to make a separate return for and pay the tax on the income of the trust estate which belongs to the beneficiary and which is under the control of the trustee. The income tax paid is paid out of the funds of the trust estate and not by the trustee personally. Furthermore, the trustee is not required to add to his *individual income* the *income of the trust estate under his administration for the purpose of calculating the surtax,* which is the principle the Government is contending should be applied to the husband in the case of community partnership income. The trustee makes one return as an individual, in which is included his personal income, and another separate return as trustee for the trust estate, in which is included the income from the property belonging to the beneficiary which is under his control. *The Government is contending, however, that the husband must include in his individual separate return the half of the community income which belongs to the wife and that the community income must be added to the husband's income for the purpose of computing his individual surtax.* We submit that it is clear that even if the husband, in his relation to the community income or his wife's interest therein, was intended to be described under the provisions of the Revenue Act dealing with *Trusts,* the only possible result would be that the husband would have to make one return for himself and a separate return as trustee of the community income, or his wife's interest therein. It has been pointed out in this brief that the property of married persons in Louisiana is

divided into three classes: the separate and individual property of the husband; the separate and individual property of the wife; and the community property belonging to both husband and wife jointly and in indivision. If the trust analogy is applied, therefore, the husband and wife would make three returns: one return including the husband's separate income, such as profits upon the sale of his separate property (see *Succession of McGee,* 132 La. 335) and perhaps his share of the community income; a second return for the wife including her separate income, if any; and a third return for the husband as managing partner or trustee of the community partnership income, or his wife's interest therein. Under the trustee analogy the husband could not possibly be required to include in his personal return income for which he was only trustee.

The reason why the so-called share of the community income of the wife was required to be included in the husband's personal return in the *Robbins* case was because the court decided, not that the husband was a trustee, but that all of the income was actually owned by and belonged to the husband, which was the real point at issue in the case.

For a further analysis of the Revenue Act under this subheading and a full discussion of the point, see the joint and supplemental brief filed in all the community income cases now being considered by the court.

(3) The "Community Partnership" Should be Classified Under the General Heading of "Partnerships" and the Revenue Acts Expressly Provide that Each Partner Shall Report in His Individual and Separate Income Tax Return His or Her Share of the Partnership Income Whether Distributed or not.

Section 218 (a) of the Revenue Act of 1926, under the heading "Partnerships", provides that:

> "Individuals carrying on business in partnership shall be liable for income tax only in their in-

dividual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

The Community or Marital Partnership, inherited from the Spanish and French Law, is certainly more closely analogous to Partnerships, as they are known to and defined by the common law, than to Trusts or any other common law status or legal relationship. The husband in Community Property States is the *Managing Partner* or *Master* of the *Community Partnership,* with liberal powers of administration so long as he is not guilty of mismanagement and acts in good faith and the partnership is not dissolved or liquidated for the various reasons provided by law. If the Marital Community or Partnership is to be considered as having been expressly included or referred to by analogy at all in the Revenue Act of 1926, it is submitted that logically and substantially it is described under the general heading of *Partnerships* quoted above.

If the Marital Partnership is analogized to partnerships as described in the Revenue Act of 1926, then we point out that the Revenue Act does not require the making of a return and the payment of an income tax by the managing partner based on the entire partnership income, but, on the contrary, provides that each partner shall report his share of the partnership income in his *individual return.* The husband and wife composing a community partnership, as the plaintiff and his wife in the instant case, would each report in *separate returns his or her half* of the community property income, in accordance with the express terms of the Revenue Act as hereinabove quoted. This is the exact procedure that was adopted by Mr. Pfaff, plaintiff in this case, and by his wife in the making of their income tax returns.

(4) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Income Exercised by the Individual Citizen or Husband Sought to Be Taxed.

The government quotes and relies on the last paragraph of the *Robbins case* in support of its contention that the Revenue Act is to be construed as taxing an individual not only on his own property and income, but, in addition, on the income and property belonging to his wife over which he exercises certain attributes of control and management.

There is nothing in the language of the Revenue Act from which we have previously quoted, which either expressly or impliedly indicates an intention to tax individuals or husbands on income admittedly owned by another person, merely on the basis of the control and administration over the property and income exercised by the person or husband sought to be taxed. We have already shown under previous headings of this brief that the Act plainly indicates that it intends to tax *individuals* on the income belonging to the *individuals.* By the language of the Act it is the net income "of" an individual which is taxed, not net income "controlled by" an individual. The Act treats husbands and wives as individuals and states that husbands and wives are to be *separately taxed,* if they so elect, on the *income of each.* A *trust estate* is separately defined as an entity for purposes of taxation under the law and the trustee pays the tax for the trust estate and charges the tax to the trust estate. It is not even suggested or contended that a trustee because of his control and administration *should add to his personal income* the income from a trust estate for the purpose of calculating his individual income tax. Likewise, corporations are also taxed as separate entities. On the other hand, Partnerships, although specifically men-

tioned and classified in the Act, as we have previously stated, are not separately taxed as entities, but the income belonging to each partner is taxed to the *partner owning the income as an individual.*

To say that the Act contemplates the taxing of an individual on income that does not belong to him, because he has certain elements of control and dominion as an agent in the administration of the property, would by analogy justify the argument that the Act contemplates that a *managing partner* of an *ordinary partnership* must add to his separate individual income the income of the entire partnership, even though other partners are owners of a substantial part of the income, for the purpose of calculating his individual income tax, because as managing partner he possesses and exercises certain attributes of control and administration. It could also be argued with equal plausibility that in the case of a *trust,* especially a *spendthrift trust,* where the trustee has liberal powers of administration and control and the beneficiaries are correspondingly restricted, the trustee should *add* to his *individual separate income the income from the trust administered by him, for the purpose of calculating his income tax, because of the administration and control exercised by the trustee with respect to the spendthrift trust estate.*

The answer to all of these suggestions and analogies is that the plain language of the Revenue Act expressly provides to the contrary. A *Trustee* is authorized and required to make one return for his own individual income and another entirely separate return for the income of the *Trust Estate* under his administration and control; and each partner, under the provisions of the Revenue Act, makes an individual return of his share of the Partnership income, irrespective of any question of relative administration or control. The husband has no more complete control in a Marital Partnership than a managing partner of an ordinary partnership where the contract of

partnership vests liberal powers of control and administration in the managing partner. There is not a word or section in the present Revenue Act, or any previous Revenue Act, which even remotely implies that Congress intended not only to tax individuals on their *own* income, but also on the income of others, when the individuals in question were *agents or administrators possessing and exercising elements of control and dominion over the income of others.*

The assertion by counsel for the Government that the test is administration or control, instead of ownership, has no support whatever in the language of the Act. One can search in vain for any language or implication which even faintly suggests the compulsory grouping of the husband and wife as the *target* of a single tax, or which requires a tax levy to be made upon their joint incomes. The basic idea of an individual income tax is that persons owning individual incomes shall contribute to the support of the government on the basis of the income owned. The burden is imposed upon those who have prospered financially and the rate is fixed by the amount of the taxpayer's individual prosperity. The tax is imposed upon "gain", "profit", "income", but only upon the gain, profit and income of the individual taxed. The essential element is ownership, and ownership is fundamental in any conception of gain, profit or income.

(5) Statutes Are to Be Construed in Favor of Taxpayers.

It is a well settled and fundamental principle that statutes relating to taxes will not be construed so as to levy taxes by implication. The taxpayer is entitled to the benefit of all ambiguities and uncertainties in the matter of interpretation of statutes which would have the effect of levying additional taxes upon such taxpayer. This principle has become elementary. See *Gould vs. Gould,* 245 U. S. 151 (1917):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 Story 369, Fed. Cas. No. 16,690; *American Net & Twine Co., vs. Worthington,* 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States,* 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189."

The Revenue Act of 1926 and previous acts are clear and unambiguous as we have pointed out. If, for the purpose of this argument, however, we assumed they were uncertain, the principle of law announced above would clearly apply under the circumstances of this case.

(6) The Question as to What is Property or Income and to Whom it Belongs is a Matter to be Determined by the Local State Law.

The present Revenue Act and all prior acts clearly evidence and indicate an intention to *tax an individual on the income which belongs to him and not the income of others, and the question as to what is property or income in any particular case for the purpose of applying the Federal Income Tax Law is and has always been considered a matter depending solely upon the local state statutes and decisions defining income and property rights.* It has always been recognized, as we have heretofore pointed out, that the Federal Revenue Acts, in taxing the income of *individuals,* do not purport to specify just how and under what circumstances income or property will vest in such individuals. The Federal Government generally recognizes that the laws of the respective States as to what is property and income, and in whom title to property or income is vested, are binding upon the Federal Government and will be followed by it, unless there is some *affirmative* and constitutional Federal Statute to the contrary.

This Court has repeatedly held that as a matter of settled policy it will follow the state decisions interpreting state laws governing property and property rights. See *De Vaughn v. Hutchinson,* 165 U. S. 566, at page 570; *Warburton v. White,* 176 U. S. 484, at page 496; *United States v. Crosby,* 7 Cranch, 115; *Middleton v. McGrew,* 23 Howard 45; *Lippincott v. Mitchell,* 94 U. S. 767; *Washington v. Miller,* 235 U. S. 422; *Buchser v. Buchser,* 231 U. S. 157; *Elmendorf v. Taylor,* 10 Wheat. 152, 159; *Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458, 464; *Knights of Pythias v. Meyer,* 265 U. S. 30; *Bucher v. Cheshire R. Co.,* 125 U. S. 555; *Burgess v. Seligman,* 107 U. S. 20, 27.

This rule has been consistently applied, without a question as to its soundness, by the General Counsel of the Internal Revenue Bureau and in every opinion of an Attorney General discussing the Community laws, from the opinion of Attorney General Palmer in 1921 to the opinion of Acting Attorney General Mitchell in 1927, including the opinions of Attorney General Palmer (1921), Daugherty (1924), Stone (1924), Sargent (1926), Mitchell (1927). See *G. C. M.* 6351, *Int. Rev. Bull.* VIII-2, p. 188; 32 *Op. At. Gen.* 298, 435; 34 *ibid.* 376, 395; 35 *ibid.* 89, 265. The Treasury Department invariably applies this rule in the administration of the Federal Estate Tax Law. The court decisions, rulings of the Treasury Department and opinions of the Attorneys General referred to here, together with numerous other decisions and rulings, are discussed and quoted in the joint and supplemental brief filed in all the community income cases now being considered by the court.

Under the Louisiana Statutes and the decisions of the Supreme Court of Louisiana, as previously shown, the wife has a vested undivided one-half ownership in community property and community income.

But even if it were the law that the Federal Courts should define and determine the nature of the wife's interest in community property under the Louisiana Statutes,

for purposes of Federal taxation, independently and without reference to the authority of the Louisiana Supreme Court decisions, the Supreme Court of the United States has itself already in considering State Community Statutes and property rights similar to those of Louisiana in *Arnett v. Reade,* 220 U. S. 311, and *Warburton v. White,* 176 U. S. 484, held that the wife under such a system of law has a vested one-half interest in the community property and that the husband as managing partner or master of the community is merely the agent of the community for purposes of administration.

We submit, therefore, that whether the Federal Courts follow the decisions of the Louisiana Supreme Court interpreting the local statutes of the State or look to independent decisions of the Supreme Court of the United States for a proper definition and determination of the wife's right and interest in community property, the same conclusion has already been reached independently and separately by both the Supreme Court of Louisiana and the Supreme Court of the United States.

B.

The Uniform and Long Continued Executive Construction Recognizing the Right of Husband and Wife in all Community Property States, Except California, to Report Separately the Share of Community Income Owned by Each, Together With the Repeated Refusal of Congress to Amend the Law so as to Avoid Such Construction and the Re-enactment by Congress Without Change of the Provisions of the Revenue Act Which Had Received Such a Long Continued and Uniform Executive Construction, Constitute a Departmental and Legislative History Conclusively Demonstrating That There Was No Intention in the Revenue Act of 1926 to Tax Husbands on the Half of the Community Partnership Income Belonging to Their Wives.

Under the preceding headings of this brief we have discussed the plain and unambiguous meaning of the lan-

guage used in the Revenue Act of 1926 without reference to departmental decisions construing the language or to the legislative history in connection with the use of such language. We now propose to show that the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and consistently at all times up to this date interpreted similar language in the prior Revenue Acts as permitting husbands and wives to divide and report the community property partnership income in separate returns and, furthermore, as a matter of legislative history, that Congress has twice rejected, once in 1921 and again in 1924, attempts to write into the Act language designed to bring about the result for which the Government is now contending. Such departmental construction and legislative history clearly demonstrate the intent of Congress.

Executive Construction and Legislative History of Revenue Acts.

The Revenue Acts of 1918, 1921 and 1924 contain the same language as the pertinent language used in the Revenue Act of 1926 and the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and uniformly interpreted the similar language contained in the previous Acts of 1918, 1921 and 1924 as permitting husbands and wives in all Community Property States, except California, to make separate returns and as taxing husbands and wives for surtax purposes on the "income of each" as determined by state law. The Revenue Act of 1926 containing the same language as the previous acts was passed in the light of, and with actual knowledge of, this long continued executive construction.

The first exhaustive opinion on this subject was rendered by Attorney General Palmer on February 26, 1921 (32 Op. Atty.-Gen. 435), which was promulgated by the Commissioner of Internal Revenue as Treasury Decision 3138 on March 3, 1921. This opinion is a carefully prepared

document of about forty pages. (See supplemental joint brief filed in this case.) *In this opinion the Attorney General construes the Revenue Act of 1918 and previous Revenue Acts as taxing a husband and wife, for surtax purposes, on their income as separate individuals and held that under the Revenue Acts the question as to what was the income of the husband and what was to be considered as the income of the wife was a matter to be determined by an examination of the local Statutes and Supreme Court decisions in each of the Community Property States creating and defining property and property rights.* The Attorney General, accordingly, reviewed the Statutes and court decisions of the various Community Property States at length and reached the conclusion that the wife had an equal, vested ownership in half of the community property and income in the States of Washington, Texas, Louisiana, Arizona, New Mexico, Nevada and Idaho, and might, in these States, make a separate return of half of such community income for income tax purposes. In California, however, the Attorney General pointed out that the local Community Property Law was different in its attributes of ownership and legal nature from the other States and that the California Supreme Court had recognized such fundamental difference. The Attorney General, accordingly, held that under the law of California the wife did not have an equal ownership in the community property with the husband, but merely the right of an "expectant heir." See also Internal Revenue Office Decision No. 426 reported at 2 C. B. 198; Treasury Decision 3071 reported at 3 C. B. 221; opinion of Attorney General Mitchell rendered July 16, 1927, 35 Op. Atty.-Gen. 265, hereinafter referred to and quoted from.

This Court has repeatedly decided "that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," and that, furthermore, "the

re-enactment by Congress without change of a statute, which had previously received a long continued executive construction, is an *adoption* by Congress of such construction." See *Brewster vs. Gage*, 280 U. S. 327; *United States vs. Cerecedo Hermanos y Compania*, 209 U. S. 337; *United States vs. G. Falk & Bro.*, 204 U. S. 143; *United States vs. Johnson*, 124 U. S. 236; *Copper Queen Mining Company vs. Arizona Board of Equalization*, 206 U. S. 474; *United States vs. Sweet*, 189 U. S. 471; *Komada & Company vs. United States*, 215 U. S. 392; *N. Y., N. H. & H. R. R. Co. vs. Interstate Commerce Commission*, 200 U. S. 361; *National Lead Company vs. United States*, 252 U. S. 140.

The Treasury Department rulings and decisions, the opinions of the Attorney General and the decisions of this Court referred to briefly under this heading, together with other additional authorities, are quoted and discussed at length in the joint and supplemental brief filed in all the community income cases now being submitted to the Court, and are not quoted from or discussed in detail at this juncture in order to avoid repetition.

Congress has Twice Rejected Amendments to the Revenue Act—Once in 1921 and Again in 1924—Which were Designed to Change the Law and Previous Executive Construction and to Expressly Permit the Taxing of the Husband having Administration of the Community Property Income on the Part of the Income Belonging to the Wife.

Revenue Act of 1921.

Accepting the construction placed upon the Act of 1918 by the opinion of the Attorney General and without obtaining an opinion as to the constitutionality of such attempted special legislation, the Treasury Department, in order to avoid and change the law as it existed and as it had been interpreted in Treasury Decision 3138 and the opinion of the Attorney General, recommended to Congress that the Revenue Law be changed; and the bill which later

became the Revenue Act of 1921, as sent to the Senate and as amended by the Finance Committee of the Senate, accordingly provided that:

> "Income received by any community shall be included in the gross income of the spouse having the *management* and *control* of the community property and shall be taxed as the income of such spouse." (Italics ours).

The amendment we have quoted was intended to overturn, in specific terms, the opinion of the Attorney General and the existing decisions and rulings of the Treasury Department and was a direct attempt by the Treasury Department to write into the Revenue Act of 1921 exactly what the Government is now contending the Revenue Act of 1926 means without the amendment. The amendment was vigorously opposed by numerous senators. In the discussion and arguments the opinion of the Attorney General was submitted to the Senate and printed in the Congressional Record. Briefs were filed and printed in the Record. The fundamental and practical features of the community property laws were pointed out in detail and the amendment was attacked by many senators on the floor as being unfair and as discriminating against the community property states. As a result of the opposition to the amendment proposed by the Treasury Department, an amendment introduced by Senator Broussard, striking out the objectional clause in the bill, was unanimously adopted. See Vol. 61, Congressional Record, pp. 7653, 8037-8.

The Treasury Department, having failed to persuade Congress to adopt the amendment we have discussed, which, if constitutional, would have overturned the existing rulings of the Attorney General and the decisions of the Treasury Department, continued to accept separate returns from husbands and wives in community property states, and the opinion of the Attorney General and the decisions and regulations of the Department, construing the Revenue Acts of 1921, 1918 and prior years, remained

in effect and operation without a question being raised as to their legal validity and soundness.

Revenue Act of 1924.

The Treasury Department in 1924 again attempted to have a provision, similar to the provision which had been rejected in 1921, inserted in the proposed new revenue act. At the public hearing held by the House Committee on Ways and Means, representatives of taxpayers of the various community property states involved appeared and in oral, as well as in written arguments filed with the Committee, explained the community property system, the opinion of the Attorney General and the Treasury decisions and made the same arguments that were made when the same amendment was proposed in 1921. It was urged that the adoption of such an amendment would be unfair and discriminatory. The lengthy arguments made, as well as the opinion of the Attorney General and Treasury Decision 3138, are printed in full in the report of Hearings before the Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The Committee, with all this information as to the existing interpretation of similar language contained in previous acts, the rulings and practice of the Department, as well as a full discussion of the merits of the situation, rejected the amendment proposed by the Treasury Department, and the bill was finally passed with the amendment eliminated, thus clearly indicating that Congress approved and sanctioned the existing rulings and practice adopted by the Treasury Department and the opinion of the Attorney General permitting husbands and wives to make separate returns of community income in community property states, other than California.

Congress When it Passed the Revenue Act of 1926 Adopted the Executive and Practical Construction Placed

on the Similar Language Used in the Previous Acts of 1918, 1921 and 1924.

The Revenue Act of 1926 contains the same language as the Acts of 1918, 1921 and 1924, which had been uniformly and continuously construed by both the Attorney General and the Treasury Department. The regulations of the Department construing these Acts had been in effect and operation since 1920 and were in effect and operation when the Revenue Act of 1926 was passed. Two amendments attempting to amend the Revenue Acts of 1921 and 1924 and designed to overturn and change the meaning and effect of the Revenue Law as previously construed by the Attorney General and the Treasury Department, had been rejected. In short, the Act of 1926, containing language similar to that construed in the previous acts, was re-enacted in the light of, and with the actual knowledge of, the long executive and legislative history we have previously outlined in detail, and, under familiar and well-settled principles of law announced in the decisions of the Supreme Court heretofore cited, the same practical intent is to be presumed from the adoption of the 1926 Act as in the case of the 1924 and 1921 Acts.

That "Ownership" not "Control" is the Test of Income Taxation and that the Revenue Act of 1926 Intends to Tax Husband and Wife on the Income of Each as Determined by the Statutes and Decisions of Each State was Announced in the Last Opinion on this Subject Rendered by then Acting Attorney General William D. Mitchell, on July 16, 1927, After the Robbins Case, Dealing with the California Law, was Decided.

It is submitted that the Government's present contention in relation to the interpretation of the Revenue Act of 1926 is inconsistent with the opinion of Acting Attorney General Mitchell, rendered July 16, 1927, 35 Op. Atty.-Gen. 265, in which the meaning and effect of the Revenue Act of 1926 and the *Robbins* case were carefully considered and

these various test suits suggested. Mr. Mitchell, after discussing the *Robbins* case and the laws of the other community property states, suggested that test suits be arranged to determine whether the laws of the other community property states were sufficiently different from the laws of California to justify a change in policy on the part of the Treasury Department.

The portions of the opinion of Acting Attorney General Mitchell addressed to the Treasury Department, pertinent to the discussion under this heading of our brief, are as follows:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins*, 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.
>
> "*The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income.* The Revenue Acts of the United States have been so drafted as to require the husband to *return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless the share belongs to her. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State.* * * *
>
> "The decision in the case of *United States vs. Robbins*, supra, dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very

substantial differences between the so-called community property system in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins* case, but in other States the systems differ very considerably from the California system. * * *

"The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administrative actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

"On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States vs. Robbins* has raised very substantial doubts as to the soundness of the two opinions. * * *

"For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts or otherwise deal with the matter as you may think proper." (Italics ours)

Even if We Should Assume, for the Purposes of Argument, That the Language in the Last Paragraph of the Robbins Case Could be Taken as Construing the Revenue Act of 1918 to Tax the Louisiana Husband on the Income of His Wife (Which is Admittedly the Property of and Owned by the Wife Under State Law), if the Husband Had Control and Administration Thereof, This Court Would Not Have Announced Such a Rule of Construction of the Revenue Act if the Long and Uniform Executive and Legislative History of the Revenue Acts of 1918, 1921 and 1924 to the Contrary, Had Been Considered in Connection With the Construction of the Act.

We agree with Attorney General Mitchell, whose final opinion on this subject we have already quoted, that

the real point at issue in the *Robbins* case was whether or not the wife under the statutes and decisions of California had a real and substantial ownership in the community property, and that the enumeration of the husband's rights in the last paragraph of the decision was merely to show by analysis that the *husband* and not the *wife* was in law and substantial fact the owner of the community property under the law of California. We do not believe, as the Government now contends, that this Court intended a new rule of statutory construction in the last paragraph of the *Robbins* case, namely, that *control* and not *ownership* was the test to determine who should pay income taxes under the Act of 1926. Even if we assume, for the purpose of argument, that the language in the last paragraph of the decision is susceptible of the construction the Government is now attempting to place on it, we do not believe that the Court would have announced such a rule if the executive and legislative history of the community property controversy had been emphasized in the *Robbins* case, for that history negatives any congressional intent to adopt *control* rather than *ownership* as the basis of taxation.

The argument and briefs in the *Robbins* case were devoted to one issue, namely, the nature of the wife's interest in community property in California and in this connection the decisions and statutes of California were cited and the sole argument and question involved was as to the meaning and effect of these local decisions and statutes. The court did not consider the fact that the Attorneys General and the Treasury Department had continuously authorized and applied an interpretation of the Act of 1918 and the subsequent Acts of 1921 and 1924 contrary to the interpretation for which the Government is now arguing; nor that Congress had repeatedly reenacted the Revenue Act in the light of this long continued and uniform executive construction without change, there-

by adopting the construction of the Executive Department; nor did the Court refer to the legislative history of the controversy, which reveals that the Department twice attempted to amend the Revenue Act, once in 1921 and again in 1924, by inserting specific language which would have written into the Revenue Act what the Government now contends the *Robbins* case interprets the Act of 1918 to mean without such language, and that Congress rejected such amendments, both in 1921 and in 1924, showing clearly that it did not desire or intend the Act to have any such construction.

In short, none of this executive and legislative history, showing the purpose and intent of Congress, was considered by the Supreme Court when the *Robbins* case was decided. This Court would not have used the language in the last paragraph of the *Robbins* case, in the sense the Government now seeks to construe it, if the long executive construction of the Act of 1918 and its subsequent legislative history had been considered by the Court, in view of the unbroken line of Supreme Court cases we have heretofore cited dealing with the effect given by the courts to the executive construction of statutes and the re-enactment of statutes in the light of such executive construction. That Attorney General Mitchell shares our view on this point is, we believe, indicated by the language he employed in the opinion quoted *supra* in which he considered the question to be decided as entirely one of *ownership* by the wife.

D

Even if the Language of the Last Paragraph of the Robbins Decision can be Reasonably Construed as Holding That the Revenue Act is to be Interpreted as Showing an Intent on the Part of Congress to Tax California Husbands on the Entire Community Income Under the Circumstances Outlined in the Decision, it is not Applicable to Louisiana Because the Community Property Rights of Husbands and

Wives Under the Law of Louisiana are Radically and Substantially Different from the Community Property Rights of California Husbands and Wives, as Outlined in the Last Paragraph of the Robbins Case, as the Reason for its Conclusion and the Basis of its Decision.

We compare the California law, as stated by the Court in its opinion in the *Robbins* case with the Louisiana law with reference to each of the points suggested.

(1) The *Robbins* opinion states that in the most recent and controlling decision of the Supreme Court of California, that Court held "that the wife had a mere expectancy," and that it was the duty of this Court to follow this decision. In Louisiana, on the contrary, the Supreme Court of the State has held that the wife, under the Louisiana statutes, has an equal and vested half interest in community property. It is the duty of this Court to follow the Louisiana decisions.

(2) The *Robbins* opinion states that *Arnett vs. Reade,* 220 U. S. 311, holding that the wife had a vested interest and ownership in half of the community property in New Mexico, would not be followed in California. *Arnett vs. Reade,* not only would be followed in Louisiana, but has been followed. It was cited by the Supreme Court of Louisiana with approval in the case of *Phillips vs. Phillips, supra.*

(3) It is not true in Louisiana, as the *Robbins* opinion found it to be in California, that it is "a rule of property that has been settled" that the husband owns all of the community property and community income. The Louisiana Supreme Court, on the contrary, has established and announced as a settled rule of property that the wife owns half of the community property and community income.

(4) The opinion in the *Robbins* case in referring to the California husband says that "although restricted in the matter of gifts, etc., he may spend it substantial-

ly as he chooses, and if he wastes it in debauchery, the wife has no redress." This is not the law of Louisiana. Unlike the law of California, in Louisiana the husband, in addition to being restricted as to gifts, is expressly denied by statute the right to dispose of or deal with the community property in **fraud of his wife's** property rights in half of the community property. The broad equitable power of the Louisiana Courts in relation to fraud are an ever present potential protection to the wife against an unfaithful or dishonest husband, who deals with the community property in violation of his trust or fiduciary obligation as master and managing partner of the community. The husband is merely the managing partner of the marital partnership with full discretion and power of administration, but as an agent and *fiduciary* he must act in good faith in the handling of the wife's interest in the community partnership. If the husband wastes the community property in dissipation and debauchery for his own pleasure, it is clear that such conduct on his part is a disposition of the community property in fraud of the wife's rights prohibited by our statute.

Furthermore, the wife has in Louisiana under such circumstances, an additional legal remedy and safeguard which is also unknown to the law of California. In case the Louisiana husband, as the opinion in the *Robbins* case expresses it, "wastes the community property in debauchery," the wife in Louisiana would be protected against such waste and against any reckless and selfish spending of the community property, **even in the absence of fraud**, because she has the right, without seeking a separation or divorce, to demand a **separation of property**, in case the husband is a *reckless* or *careless* administrator or the *disorder of his affairs is such as to jeopardize the wife's community* or other property rights. The wife, in such cases, upon showing that her husband is wasteful, incapable, speculative or otherwise incompetent, or that his affairs

are in disorder, can obtain an immediate dissolution and liquidation of the community partnership, and can take over the separate control and administration of her half of the community and displace the husband as managing partner of the community partnership.

(5) In the opinion of the Court in the *Robbins* case, *Garrozi vs. Dastas,* 204 U. S. 64, a decision dealing with the right of the husband under the Porto Rican Community Property Law (which was similar to the California Community Property Law) was cited by this Court in support of the statement that in California the "husband may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery, the wife has no redress." This statement is not true of the law of Louisiana, as heretofore shown, and *Garrozi vs. Dastas* would not be followed in Louisiana.

(6) The opinion in the *Robbins* case says, "not only should he who has all the power bear the burden. * * *" This statement describes the law of California, but not the law of Louisiana. In Louisiana the husband has not all the **power**. The husband's power of administration is substantially limited in Louisiana, since he cannot spend the income *recklessly* or in debauchery or deal with the property in fraud of his wife's rights, and even in the absence of fraud, in case of mismanagement and mal-administration, the wife can remove the husband as manager of the community partnership and take over herself the management of her half of the community property. None of these limitations on the power and rights of the husband exists in California. In addition to the limitations mentioned above, the husband in Louisiana is deprived of many other important powers and attributes of ownership hereinafter described.

(7) The wife in Louisiana has full power of **testamentary disposition** as to her one-half of the community

property and can will it to anyone she pleases, even a lover, because under the law of Louisiana she is the owner of half of the community property. In California, at the time the *Robbins* case was decided, the wife had no power to will any part of the community property because under the law of California it all belonged to and was owned by the husband. The entire community property in California belonged to the husband and was under his power and dominion as owner, and the wife could not deal with it or dispose of any part of it by will.

(8) The husband has not the right or power in Louisiana to have more than half of the community property **descend** to his heirs at law. In California, as in common law States where the husband is the absolute owner of all property acquired by him subsequent to marriage, when he dies intestate, his heirs at law, (including his wife as forced heir), inherit all the community property. In Louisiana, unlike California, since the wife owns half of the community property, when the husband dies, only half of that property **descends** to his heirs at law. The wife's one-half of the property acquired during marriage belongs to her and remains hers, and the heirs of the husband have no right or remedy or any claim of any kind with reference to the wife's one-half of the property.

It is clear that the husband cannot do with the wife's half of the community property as he pleases in Louisiana, since he cannot dispose of it by will and it is not inherited by his heirs. The right to will one's property and to have one's property descend to one's heirs are certainly two very important powers and attributes of ownership.

(9) If a separation from bed and board or divorce is obtained in California, as in any common law State in the Union, based on the wife's infidelity or unjustified desertion of the husband, the wife would not even be entitled to alimony, much less to a division of property. In Louisiana,

however, because the wife owns one-half of all property acquired during marriage and the community partnership is automatically dissolved and liquidated in case of separation from bed and board or divorce, she obtains full control and administration of her half of the community property and the husband is displaced as manager and master of the community, even though the wife is guilty and wholly to blame for the situation bringing about a dissolution of the community partnership. This right we are discussing is independent of any question of alimony, (which is governed by separate statutes), and grows out of the fact that, under the law of Louisiana, the wife is the real and substantial owner of one-half of the community partnership property and income. Thus, upon the termination of the partnership by either separation from bed and board or divorce, and irrespective of the merits of the marital disagreement, the wife in Louisiana is entitled to have the community partnership immediately dissolved and liquidated and to demand delivery to her of her half of the community assets and profits free and clear of the administration and control of the husband. Whatever may be said of the power of a California husband, it certainly cannot be said, under the circumstances we have outlined, that a husband in Louisiana has full power and control over the community property, "as if it were his own," when, without any fault on his part he may at any time lose such power of administration and control over the wife's half of the property.

(10) In California, since the husband is owner of all the community property, which includes property acquired by the husband during marriage, if the wife dies before the husband, her death has no effect whatever on the husband's right to property acquired during the marriage. He continues owner as before, and the property acquired during marriage forms no part of his wife's estate and continues to be his property. The same is true in all common law States. In Louisiana, on the contrary, if the wife dies

before the husband without having disposed of her part of the community property by will, the community partnership must be liquidated and one-half of the property must be delivered by the husband to the heirs of the wife. If the wife leaves a will, one-half of the property must be delivered by the husband to the legatees of the wife. If the wife dies without a will and there are no children, the husband is the heir of the wife in so far as her one-half of the community property is concerned, and he inherits this half of the community property as any other heir. Likewise, if the wife wills her half of the community property to the husband, the husband takes as a legatee. In all cases the heirs or legatees of the wife must pay a state inheritance tax and Federal Estate Tax. If it so happens that the husband is the heir or legatee of the wife, he must pay an inheritance tax under the law of Louisiana, as well as an estate tax under the Federal Estate Tax Law. The half of the community property belonging to the wife is, therefore, upon her death subject to both a State inheritance tax and a Federal Estate Tax. In California, during the period of time under discussion in the *Robbins* case, the husband owned all of the property acquired during marriage, although it was designated as community property, and, therefore, nothing could be inherited by him or willed to him by his wife and nothing could be inherited by or willed to any other person by the wife in the event of her death before her husband, and consequently, the husband was not compelled to pay either a State or Federal inheritance tax upon his wife's death.

(11) In California, if the husband dies before the wife, the wife is considered as taking her half interest by inheritance so that she must pay both State Inheritance taxes and Federal Estate taxes upon the half which she thus takes. In Louisiana, when the husband dies, the wife's half interest in the community property is not subject to any State Inheritance tax and the Government recognizes that

it is not subject to any Federal Estate tax because she takes not as **heir** but in **her own right.**

(12) If a husband has been continuously absent from his domicile for a period of five years, the wife in Louisiana is, at her option, entitled either to the administration of the community partnership property, or to a dissolution and liquidation of the community partnership. (See Article 64 R. C. C.) In California, since the husband is the owner of all of the community property the wife has no such right.

(13) Upon suing for a separation of property or a divorce the wife may obtain an injunction prohibiting the husband from disposing of the community property to her prejudice during the pendency of the suit. In California the wife is not entitled to a separation of property in case of mismanagement, much less to an injunction to protect her property rights, because in California, the husband owns all of the community property and the wife has no proprietary interest in it during marriage.

(14) If the husband in Louisiana uses the community income or community property to improve his separate estate, he must account to the community, and his separate estate becomes the debtor of the community. No such rule prevails in California since there all of the community property belongs to the husband and he can spend it on his separate property or in any way he pleases.

(15) If the husband in Louisiana wrongfully uses the community property income or property to pay his separate debts, he must account to the community, and his separate estate becomes the community's debtor. In California this is not the law. Since the husband owns all of the community property in California in the same way that he owns his separate estate he can do with the community property and income as he pleases.

(16) In the *Robbins* opinion it is said: "but the fund taxed, while liable to be taken for his debts is not

liable to be taken for the wife's, Civil Code, Section 167, so that the remedy for her failure to pay might be hard to find." In Louisiana the obligation to pay income taxes incurred by the husband and wife by the making of separate returns with the permission and consent of the husband as master and manager of the community, would be a community debt for which the community property could be levied on.

All of these substantial restrictions and limitations on the husband's administration of the one-half of the community partnership property belonging to the wife, resulting from the Louisiana marital partnership law, have been dealt with in detail under Part I of this brief. We have repeated them here briefly in connection with this phase of the argument in order to emphasize the radical and substantial differences between the law of California and the law of Louisiana, and to show that the reasons on which the last paragraph of the *Robbins* case was based do not apply under the law of Louisiana. We submit, therefore, that if the Court in its *Robbins* opinion, in enumerating the particular laws of California with respect to the rights of husbands and wives in community property in California, already referred to, is to be understood as justifying conclusions either with reference to the *power* or with reference to the *intent* of Congress to tax husbands on the entire community income, then, in either event, such reasons and conclusions do not apply in Louisiana because the Louisiana law differs widely from the law of California with respect to each of the statements of the law of California contained in the *Robbins* case.

CONCLUSION.

We submit:

That the wife in Louisiana is the vested owner of a one-half interest in the community income.

That the history of the Revenue Acts demonstrates that Congress intended to tax income in a community

partnership only to the owner thereof and not upon any theory of dominion or control.

That even if the history of the Revenue Acts were disregarded and it were held to be the intent of Congress to tax income to one who is not the owner thereof if he can spend it "substantially as he chooses" or if he has "unfettered command" of it, the husband in Louisiana cannot be taxed upon his wife's half of the community income because under the law of Louisiana he has not any such command over it nor can he spend it substantially as he chooses.

Respectfully submitted,

CHARLES E. DUNBAR, JR.,
MONTE M. LEMANN,
J. BLANC MONROE,
WALKER B. SPENCER,
Attorneys for Respondent.

APPENDIX

Louisiana Revised Civil Code, 1870:

Art. 64. The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

Art. 119. The husband and wife owe to each other mutually, fidelity, support and assistance.

Art. 120. The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

Art. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

Art. 136 The bond of matrimony is dissolved:

1. By the death of the husband or wife;
2. By a divorce legally obtained;
3. Whenever the marriage is declared null and void, for one of the causes mentioned in the fourth chapter of this title; or when another marriage is contracted, on account of absence, when authorized by law.

Separation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their

conjugal cohabitation, and to the common concerns, which existed between them.

Art. 138. Separation from bed and board may be claimed reciprocally for the following causes:

1. In case of adultery on the part of the other spouse.
2. When the other spouse has been condemned to an infamous punishment.
3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill treatment is of such a nature as to render their living together insupportable.
4. Of a public defamation on the part of one of the married persons toward the other.
5. Of the abandonment of the husband by his wife, or the wife by her husband.
6. Of an attempt of one of the married persons against the life of the other.
7. When the husband or wife has been charged with an infamous offense and shall actually have fled from justice, the wife or husband of such fugitive may claim a separation from bed and board on producing proofs to the judge before whom the action for separation is brought that such husband or wife has actually been guilty of such infamous offense, and has fled from justice.

Art. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.

Art. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debts on account of the community; nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

Art. 155. Separation from bed and board carries with it separation of goods and effects.

Art. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from

bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

Art. 160. If the wife who has obtained the divorce, has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income; provided, however, that in cases where the husband has obtained judgment of divorce on the ground that the married persons have been living separate and apart for a period of seven years or more, and the wife has not been at fault, then the court may allow the wife in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage. (As amended by Act 21, Acts of Louisiana, 1928, p. 24.)

Art. 915. When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse. (As amended, Act 160, Acts of Louisiana 1920, pp.250-251.)

Art. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

Art. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed.

Art. 2334. The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses, and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife by reason of fault on her part, sufficient for separation or divorce, shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent. (As amended, Act 186, Acts of La., 1920, pp. 304-305).

Art. 2392. Married persons may stipulate that there shall be no partnership between them.

Art. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time

when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws. (As amended by Act 68 of 1902, Acts of La., 1902, p. 95).

Art. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

Art. 2404. The husband is the head and master of the partnership of community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyances *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor. (As amended by Act 96 of 1926, Acts of Louisiana, Reg. Sess., 1926, p. 136.)

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

Art. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2406. The effects which compose the partnership or community of gains, are divided into two equal por-

tions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2408. When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase of ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

Art. 2425. The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to a mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

Art. 2430. The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Art. 2432. The judgment which pronounces the separation of property, is retroactive as far back as the day on which the petition for the same was filed.

Art. 2433. The personal creditors of the wife cannot, without her consent, petition for a separation of property between herself and her husband.

Nevertheless in case of the failure or discomfiture of the husband, they may exercise the rights of *their* debtor to the amount of their credits.

Art. 2839. Partnership *in commendam* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.

Art. 2844. The partner *in commendam* can not bind the other partner by any act of his: he is not considered as a partner, further than is specially provided in this section.

Art. 2849. The business of the partnership, to which the partner *in commendam* has contributed his advance, must not be carried on in the name of such partner, or in his name jointly with others, or by him or by his agency as agent, or attorney for the other partners, but by those to whom he has made the advance, and in their name or firm; and if the advance *in commendam* has been made to one person only, such person must carry on the business in his sole name, and must not make the addition "and company," or adopt any firm that may cause it to be understood that he has any partners.

And if the partner *in commendam* shall take any part in the business of the partnership, or permit his name to be used in the firm, or knowingly permit any single person to whom he has made the advance, to add any words to his name or firm, that may imply that he has other partners besides the partner *in commendam*, when in fact he has none, such partner *in commendam* shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.